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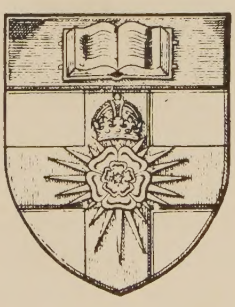

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IRISH REPORTS 1894-

REPRINT 1976

Printed and Published
in Great Britain by
Professional Books Limited,
of Milton Trading Estate,
Milton, Abingdon, Oxon.

PROFESSIONAL BOOKS LIMITED

THE IRISH REPORTS.

PUBLISHED UNDER

THE CONTROL OF THE INCORPORATED COUNCIL OF LAW REPORTING FOR IRELAND:

CONTAINING

REPORTS OF CASES ARGUED AND DETERMINED

IN

THE COURT OF APPEAL,

THE HIGH COURT OF JUSTICE,

THE COURT FOR CROWN CASES RESERVED,

IN IRELAND,

AND

THE IRISH LAND COMMISSION.

EDITED BY

WILLIAM GREEN,

BARRISTER-AT-LAW.

1898.

VOL. II.

THE QUEEN'S BENCH DIVISION AND THE IRISH LAND COMMISSION.

DUBLIN:

PUBLISHED FOR THE INCORPORATED COUNCIL OF LAW REPORTING FOR IRELAND,

BY EDWARD PONSONBY,

116, GRAFTON-STREET, DUBLIN.

1898.

BIBL. LONDIN. UNIV.

DUBLIN:

PRINTED FOR THE INCORPORATED COUNCIL OF LAW REPORTING FOR IRELAND,

At the University Press,

BY PONSONBY AND WELDRICK.

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MEMORANDA.

During the Christmas Vacation, 1897-98, WILLIAM KENNY, ESQ., Q.C., Her Majesty's Solicitor-General for Ireland, was appointed a Justice of the Queen's Bench Division of the High Court of Justice in Ireland, and DUNBAR PLUNKET BARTON, Esq., Q.C., was appointed Solicitor-General.

During the same Vacation Mr. JUSTICE BEWLEY resigned office as Judicial Commissioner of the Irish Land Commission, and R. E. MEREDITH, Esq., Q.C., was appointed Judicial Commissioner.

CORRIGENDA.

Page 124, line 14 from foot, *for* "approximate" *read* "appropriate."
,, 214, line 6 from foot, *for* "There" *read* "Here."
,, 214, line 4 from foot, *after* "Lords" *read* "in *Geddis's Case.*"
,, 344, note (1), *for* "Q. B. D." *read* "Q.B."
,, 545, line 5, *for* "facts" *read* "parts."
,, 549, line 9, *for* "possible" *read* "probable," and *for* "impossible" *read* "improbable."
,, 762, head note line 9, *for* "s. ccev." *read* "c. ccev."

NOTE.

The COURT OF APPEAL have affirmed the judgment of the Queen's Bench Division in HANNA *v.* POLLOCK [1898] 2 I. R. 532, and have reversed the judgment of the Queen's Bench Division in THE ATTORNEY-GENERAL *v.* ATHENRY AND TUAM EXTENSION TO CLAREMORRIS RAILWAY CO., IN RE MAYO PRESENTMENT; KELLY *v.* REG. [1898] 2 I. R. 719.

CASES

DETERMINED BY

THE QUEEN'S BENCH DIVISION

OF

THE HIGH COURT OF JUSTICE IN IRELAND,

AND BY

THE IRISH LAND COMMISSION,

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL,

AND BY

THE COURT FOR CROWN CASES RESERVED.

1898.

FITZGERALD *v.* M'COWAN AND OTHERS (1).

Q. B. Div. 1896. Nov. 23–25. 1897. Jan. 27.

Principal and surety—Co-sureties—Contribution—Non-execution of instrument by one of several co-sureties—Discharge—Baronial guarantee counter-security for—Relief of Distress (Ireland) Acts, 1880, 1881 (43 *Vict. c.* 4; 43 & 44 *Vict. c.* 14; 43 & 44 *Vict. c.* 44).

Under the Relief of Distress (Ireland) Acts, 1880 and 1881, the Commissioners of Public Works agreed to advance £95,000 to certain Harbour Commissioners in county Kerry on repayment with interest being guaranteed by five baronies of the county. As a counter security, under said Acts, seven persons signed an agreement, dated 20th September, 1881, that, if the baronial guarantee was given, they would enter into a deed of covenant jointly and severally with the Secretary of the Grand Jury, acting under these Acts, in such manner as the extraordinary Presentment Sessions (to be convened under said Acts by the Lord Lieutenant) should require, to pay, in relief of four of these five baronies, one-nineteenth of every sum which the five

(1) Before SIR PETER O'BRIEN, L.C.J., and JOHNSON and HOLMES, JJ.

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baronies might be called upon to pay, so as to indemnify the four baronies to that extent. This document was submitted to, and approved of, by the Sessions, the guarantee given, and the advance made. It was then handed by the Solicitor for the Harbour Commissioners to the solicitor for the Secretary of the Grand Jury (the plaintiff) in order that the latter might have the deed of covenant perfected. The plaintiff's solicitor, when the draft was ready, gave notice to the signatories that it was ready for their approval; receiving no reply, he engrossed the draft and sent it, on the 9th March, 1883, to the solicitor for the Harbour Commissioners, requesting him to get it executed. The deed of covenant was subsequently executed, as of the 9th March, 1883, by all the signatories to the agreement of 1881, except H. H. had left Ireland in April, 1882, and had been resident abroad until July, 1894. During this time he had not been required, nor had any steps been taken to compel him, to execute the deed. Meanwhile, as instalments of the baronial guarantee were from time to time called for, the plaintiff applied to the six persons by whom the deed had been executed (the defendants) for payment of one-sixth each of the one-nineteenth of such instalments, and was paid these amounts by them. They knew that H. was out of the country; that he had been and was in embarrassed circumstances; but were unaware that he had not executed the deed. In March, 1894, the plaintiff informed one of the defendants that one of the sureties had not executed the deed. Thereupon the six defendants repudiated liability. In July, 1894, H. returned to Ireland; and, in August of that year, the plaintiff's solicitor wrote asking him to execute the deed. H. refused. The plaintiff now brought this action, on the deed of covenant of 1883, against the six defendants who had signed same, to recover the full one-nineteenth of certain moneys the baronies had been obliged to pay on foot of their guarantee. Verdict, by direction, and judgment having been entered at the trial for the plaintiff, the defendants now moved to have same set aside and judgment entered for them :—

Held, that the defendants had signed the deed of 1883 on the faith that it should be executed by all the seven parties to the agreement of 1881; that it lay on the plaintiff to obtain the execution of same by the parties thereto; that H.'s known insolvency at the time did not render execution of the deed by him immaterial; that there was no evidence of waiver of their rights by the defendants, or of acquiescence in the non-execution of the deed by H.; and that the action was therefore unsustainable.

Evans v. *Bremridge* (2 K. & J. 174; 8 D. M. & G. 101) followed.

NEW TRIAL MOTION. Under the provisions of the Relief of Distress (Ireland) Acts, 1880, and 1881 (43 Vict. c. 4; 43 & 44 Vict. c. 14; 43 & 44 Vict. c. 44), the Commissioners of Public Works agreed to advance £95,000 to the Tralee and Feenit Pier and and Harbour Commissioners, on the repayment with

interest being guaranteed by five baronies of the county Kerry. As a counter security, pursuant to these statutes, seven persons signed an agreement, dated the 28th September, 1881, to be submitted to the extraordinary presentment sessions convened for the five baronies by order of the Lord Lieutenant, that, in the event of the baronial guarantee being given, they would enter into a deed of covenant jointly and severally with the secretary of the Grand Jury (who was constituted a corporation sole for the purposes of the said Acts), in such manner as the presentment sessions should require, to pay, in relief of four out of the five baronies, one-nineteenth of every sum which the five baronies should be called upon to pay, so as to indemnify these four baronies to that extent. This agreement was submitted to, and approved of by the sessions, the baronial guarantee given, and the money advanced by the Commissioners of Public Works. It was then handed by the solicitor for the Harbour Board to the solicitor for the secretary of the Grand Jury (the plaintiff), in order that the latter might perfect the security. On the 15th December, 1882, the plaintiff's solicitor wrote to the seven subscribing parties to the agreement, stating that the draft deed of covenant was ready for their approval. It did not appear that he received any answer, and, on the 9th of March, 1883, the plaintiff's solicitor, having engrossed the draft, sent it to the solicitor for the Harbour Board, requesting him to have it executed. The deed of covenant (which bears date the 9th March, 1883), was subsequently executed by all the signatories to the agreement save one, Mr. Herbert. Mr. Herbert had left Ireland in April, 1882, and had been resident abroad until July, 1894. During this time he had not been required to execute the deed, nor had any step been taken to compel him to do so. Meanwhile, as instalments of the baronial guarantee were called for from time to time, the plaintiff applied to the six persons by whom the deed of 1883 had been executed for payment of one-sixth each of the one-nineteenth of such instalments, and was paid these amounts by them. They knew that Mr. Herbert was out of the country; that he was in embarrassed circumstances; but did not know that he had not executed the deed of covenant. In March, 1894, the plaintiff informed one of them that one of the sureties would not pay, and subsequently produced the deed, showing that it

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had not been signed by Mr. Herbert. Thereupon the six signatories repudiated liability. In July, 1894, Mr. Herbert returned to Ireland, and in August of that year the plaintiff's solicitor wrote to him asking him to execute the deed. He refused. The plaintiff now brought this action, on the deed of covenant of 1883, against the five survivors of the six persons by whom the deed had been executed, and against the executor of the sixth, to recover the full one-nineteenth of certain of the instalments which the baronies had been obliged to pay under their guarantee. The statement of claim alleged that the deed of 1883 had been executed by the six signatories with the full knowledge that Mr. Herbert had not executed, and would not execute same, and with the further knowledge that, owing to his pecuniary circumstances his execution thereof would be useless and worthless to them, and that they had waived the execution thereof by him. The defendants pleaded that the instrument had been executed upon the faith, and in the belief, and upon the condition, that same would be executed by Mr. Herbert. They further counterclaimed for a return of the amounts theretofore paid under mistake of fact. The only question left at the trial to the jury was, whether Herbert was solvent in 1883, and since? To which the jury answered, No. The learned Judge who tried the case (Mr. Justice O'Brien), having directed a verdict, and given judgment for the plaintiff for the amount claimed, the defendants now moved that the verdict and judgment, so entered in the original action, should be set aside, and verdict and judgment entered for the defendants, the counterclaim being abandoned.

Matthew J. Bourke, Q.C., and *Seymour Bushe, Q.C.* (*J. B. Sandford* with them), for the defendants.

G. Wright, Q.C., and *R. E. Meredith, Q.C.* (*Morphy* with them), for the plaintiffs.

In addition to the authorities mentioned in the judgments, reference was made during the argument to *Mayor of Durham* v. *Fowler* (1); *Underhill* v. *Norwood* (2); *Bonsor* v. *Cox* (3); *Barry* v. *Morony* (4).

Cur. adv. vult.

(1) 22 Q. B. D. 394.
(2) 10 Ves. 207, 225.
(3) 4 Beav. 379. [554.
(4) Ir. R. 7 C. L. 110; Ir. R. 8 C. L.

JOHNSON, J. (1) :—

This is a motion to set aside the judgment for the plaintiff, and enter judgment for the defendants. The facts involved in the present case range over a period of at least thirteen years. In 1881, the Board of Works agreed to lend £95,000 to the Tralee and Feenit Pier and Harbour Commissioners on repayment with interest being guaranteed, pursuant to the provisions of the Relief of Distress Act, 1881, by five specified baronies of the county of Kerry; and the Lord Lieutenant convened extraordinary presentment sessions under the Act for each barony to consider an application by the Commissioners for such guarantee. The Act authorised the Sessions to "agree" with the Commissioners "as to the mode in which they should repay or secure to the barony any sums paid by the barony on account of the loan with interest"; and, as the extraordinary presentment sessions would cease to exist when the purpose for which they were called into existence was accomplished, the Act further provided that "such security may be taken on behalf of the barony by the secretary of the Grand Jury," who with his successors in office were incorporated for that purpose. To induce the sessions to grant the guarantee, and to remove Lord Ventry's opposition (as appeared at the trial) seven persons, viz. Mr. Herbert, formerly M.P. for Kerry, Sir H. Donovan (since deceased), and the defendants (except Mr. St. John H. Donovan, who is sued in this action as representative of Sir H. Donovan), subscribed the agreement of the 28th September, 1881, to be submitted, and it was accordingly submitted by the Commissioners, and agreed to by the presentment sessions while in session. The guarantees were presented; the extraordinary presentment sessions expired; and the Board of Works advanced the loan to the Commissioners, repayable with interest by instalments spread over forty years; and the ratepayers of the guaranteeing baronies have been called on, and still continue, to pay the guarantee. By this agreement of 1881 the seven subscribers to it agreed, in consideration of the guarantee by the five baronies, to enter into a deed of covenant,

(1) Mr. Justice Johnson, being engaged at *Nisi Prius*, the judgments were delivered in this order.

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Johnson, J.

jointly and severally, with the secretary of the Grand Jury of the county of Kerry, under the provisions of section 14 of the Act, and "in such manner as the presentment sessions should require," to pay to the County Treasurer, in relief of four of the five guaranteeing baronies, one-nineteenth of every sum which the five baronies should be called on to pay on foot of the guarantee—the concluding clause of the agreement expressing that it was the intent of the subscribers of the agreement to indemnify the four baronies to that extent. The agreement having been thus approved of, and agreed to by the Sessions, was handed by the Commissioners' solicitor to the solicitor for the secretary of the Grand Jury (the now plaintiff), in order that, pursuant to the Act, the security might be taken on behalf of the baronies by the secretary of the Grand Jury, so appointed by the statute to represent and act on behalf of the guaranteeing cesspayers. For more than a year nothing was done; but, on the 15th December, 1882, the plaintiff's solicitor wrote to each of the seven subscribers of the agreement, informing them that the draft of the deed was ready, and inquiring whether they wished it to be approved of by any solicitor on their behalf. Mr. Herbert took no notice of the communication, and it does not appear what, if any, reply was given by the others. On the 9th of March, 1883, the plaintiff's solicitor, having engrossed the draft, sent the engrossment to the Commissioners' solicitor (since deceased), and requested him to get the deed executed "as quickly as possible." It was executed first by Sir H. Donovan, and the defendants Messrs. Latchford, S. Huggard, and M'Cowan, in the office of the plaintiff's solicitor, who attested their execution, and then by the defendants Messrs. Sandes and Hewson in the presence of a different solicitor. It bears date the 9th of March, 1883, and has always been and is in the plaintiff's possession. Mr. Herbert never executed the deed; nor, until the letter of the plaintiff's solicitor, on the 17th of August, 1894, was he ever called on to execute it. He was and is the owner of large but incumbered estates in Kerry, and it was proved at the trial that, in April, 1882, about seven months after the presentment sessions had agreed to the security and presented the guarantee, he went to England and resided there for about a year, except for two or three months in the autumn, when he was

again in Ireland; he then went to New York, and except for about a fortnight in 1885, was continuously in America until June or July, 1894. During all this time his estates in Ireland were managed by an agent and under-agent, both examined at the trial; but he was not required to execute, nor was any step taken to compel him to execute the deed of covenant, or to carry out his agreement of 1881; nor, until March, 1894, was Sir H. Donovan or any other of the defendants informed that he had not executed it. As each instalment of the guarantee was called for, the plaintiff (on behalf of the baronies) wrote to Sir H. Donovan, and each of the now defendants who had subscribed the agreement (in all six persons) for payment of one-sixth—not one-seventh—of the one-nineteenth part of the amount of the guarantee called for, and in each letter enumerated by name Sir H. Donovan, and the now defendants (except Mr. Donovan) as each liable to contribute one-sixth, but not naming or referring to Mr. Herbert. Each of the six persons so applied to from time to time paid the one-sixth so demanded up to March, 1894, when the cheque of the defendant Mr. S. Huggard for the one-sixth then demanded was returned to him by the plaintiff, with the information that "one of the sureties would not pay"—who or why is not explained—and this singular transaction was soon followed by the plaintiff's production of the original deed of covenant to Mr. Huggard, who then saw, and at once it became generally known, that Mr. Herbert had not executed the deed. Thenceforth the defendants repudiated liability and refused to pay. In the summer of 1894 Mr. Herbert returned to Ireland, and, being at the Muckross Hotel, Killarney, the plaintiff's solicitor, on the 17th August, 1894 (nearly thirteen years after the agreement of 1881, and about four months after the defendants had repudiated liability), wrote to Mr. Herbert reminding him of the Board of Works' loan, and of the agreement which he had signed, and requested him to appoint a day to execute the deed of covenant. To this communication Mr. Herbert replied that he "was advised not to sign the deed"; thus the matter remains as far as Mr. Herbert is concerned; and the plaintiff then instituted this action on the deed of covenant on the deed of 1883, against the defendants—Mr. Donovan being made a defendant only as representing Sir H. Donovan, deceased.

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The defence substantially is that the defendants, other than Mr. Donovan, executed the deed of covenant of 1883 only in pursuance of the agreement of 1881 that Mr. Herbert and they (being the seven persons named as parties of the first part in the deed) should be jointly and severally bound by the covenant in the deed, and on condition that the deed should be operative as a deed only on its being also executed by Mr. Herbert; that he never executed it, and that they had no notice that the deed was not to be or would not be executed by him, and no knowledge or notice up to the 14th of March, 1894, that it had not been executed by him. These averments are not disputed, and they appear to me to dispose of the case. All parties agreed at the trial that the only questions for the jury were whether Mr. Herbert was in insolvent circumstances when the defendants made the payments to the plaintiff, and whether the defendants knew it.

Notwithstanding the ancient learning on the point, as in Co. Litt., 36*a*, and 1 Shep. Touch., pp. 58, 59, it has been long well settled that a deed sealed and delivered, even by the party himself, on such a condition, is not operative as a deed, or binding on the person who has so sealed and delivered it until the condition is performed. It is not essential that this should be so expressed in words; the question in every case is what was the intention at the time: *Gudgen* v. *Besset* (1), a case of covenant; and *Pym* v. *Campbell* (2). In *Kidner* v. *Keith* (3), Williams, J., says:—"There is no doubt in point of law that where by express declaration, or from the circumstances, it appears that the delivery of a deed was not intended to be absolute, but that the deed was not to take effect until some contemplated event should have happened, the deed is not a complete or perfect deed until that event has happened." In *Nash* v. *Flyn* (4), Sir E. Sugden expresses himself to the same effect. Nor can any inference of liability on the part of the defendants be deduced from the fact that they executed, as they were called on to execute, the deed, without waiting for Mr. Herbert to execute. Parties of the same part usually execute the instrument when it is tendered to them or when it is convenient, on the faith that it will be duly executed

(1) 6 Ell. & Bl. 986.
(2) *Ibid.* at p. 373.
(3) 15 C. B. (N. S.) at p. 43.
(4) 1 Jo. & Lat. p. 175.

by all the necessary parties, and not necessarily in the order in which the draughtsman happens to have arranged their names. In *Latch* v. *Wedlake* (1), Lord Denman, C.J., says:—"Wherever an instrument is to be executed by several parties there must be some interval between the execution by each, and, if all be not present at the same time, that interval may be considerable; and it cannot be contended that the mere fact of execution by one conclusively binds him, where that has been done on the faith that all will execute, and any one shall refuse." I agree with the plaintiff's counsel that the present is not a case of sureties. There is no principal debtor for whom the defendants are co-contracting sureties for a common debt to a creditor; it is the ordinary case of joint, and joint and several, co-contractors by covenant for payment of a common ascertainable debt in a certain ascertainable amount; but in each of these classes of case the rights *inter se* of the co-contractors are similar; they flow directly from the same source, viz. the relation of the co-contractors to each other, and are founded on the principle of equality in bearing a common burden. Therefore it is that, in the absence of express arrangement to the contrary, a co-contractor who pays more than his quota is entitled to contribution from his co-contractors. The authorities in equity are conveniently collected under *Dering* v. *Lord Winchelsea* (2), and amongst those at law are *Batard* v. *Hawes* (3); *Batchellor* v. *Lawrence* (4); *Gardner* v. *Brooke* (5); and the Mercantile Law Amendment Act (19 & 20 Vict. c. 97, s. 5) authorizes the enforcement of this right by means of every security held by the creditor in respect of the common debt.

The defendants' case, therefore, is that, owing to the default or omission of the plaintiff to procure Mr. Herbert's execution of the deed, it never was perfect or operative as a deed, the defendants have thus lost all right of contribution from him, while on their part they have not waived their rights or consented to any variation of the contract contained in the agreement of 1881 which the Presentment Sessions agreed to; and consequently that this action is not sustainable against them. On

(1) 11 A. & E. p. 965.
(2) 2 Wh. & T., L. C. 535.
(3) 2 Ell. & Bl. 287, 299.
(4) 9 C. B. (N. S.) 543.
(5) [1897] 2 Ir. R. 6.

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the other hand, several contentions, which may be reduced to four, have been put forward and very ably argued on behalf of the plaintiff to sustain the judgment obtained in the action.

First, it is contended that whether the defendants had or had not knowledge or notice that Mr. Herbert had not executed the deed, yet it did not lie on the plaintiff to procure his execution of it; but, on the contrary, that it lay on the defendants (if they considered it material for their interests) "to bring him in," as it was argued, and procure his execution. As to this contention, the plaintiff was the statutory representative of the baronies; the security which the Sessions had "agreed to" on behalf of the baronies was a joint and several covenant by the seven subscribers to the agreement of 1881; and this security was to be taken by and to the secretary of the Grand Jury on behalf of the baronies, the protection of whose interests the Legislature had entrusted to him. In the absence of other arrangements, it is the person by whom the security is to be taken, or to whom it is to be made, *e. g.* a mortgagee, an obligee, a grantee, or covenantee, or creditor, or the like, by whom the draft security or instrument is prepared and engrossed, and who tenders it for execution to and has it duly executed by the other necessary parties, and, when it is perfected, retains it so long as the security is in force. All this the plaintiff undertook to discharge. His solicitor prepared the draft, offered to submit it to any solicitor for the defendants for approval; engrossed it; and had the deed executed by six out of the seven persons named in it as the parties of the first part, and retained it in his possession. The engrossed deed, when tendered to Sir Henry Donovan, and to the defendants respectively, for execution, represented and showed on the face of it that (as provided by the agreement of 1881) it was intended to be made between the seven covenantors of the one part and the plaintiff of the other part, and to be executed by each of the seven covenantors; but, notwithstanding this representation, when the plaintiff had it executed by six only out of the seven covenantors (without informing the six executing parties or any of them that he had not called on the seventh person to execute, or that the seventh person had not executed) the plaintiff proceeded to act on the deed as if it had been duly perfected and executed by all the necessary parties

of the first part. *Evans* v. *Bremridge* (1), which was cited for the defendants, is directly in point on this part of the case. There the creditor prepared the deed, showing on its face that it was intended to be a joint and several covenant by two sureties, and sent it to one of the sureties, who executed it on the faith that it would be executed by the other surety. The other surety never executed it, and the creditor never informed the surety who executed that his intended co-surety had not executed. The contract of the defendant, antecedent to the deed, was to become co-surety with another surety, and it was held that the surety who executed the deed was discharged from all liability by the non-execution of the other intended co-surety, and that the deed was not binding on him.

In the present case the plaintiff stated at the trial that he "did not consider that it would invalidate the deed that Mr. Herbert had not signed it." This explanation accounts for the fact that Mr. Herbert was not required to execute the deed, and that the defendants were not informed that Mr. Herbert had not executed it, and that the plaintiff never thought it worth while to take advice on the subject; but it furnishes no answer to the defendants' case, and, in my opinion, this first contention for the plaintiff fails.

Secondly, it is contended for the plaintiff that the form in which the applications were made to them for payment, mentioning each of the six defendants by name and omitting Mr. Herbert, and demanding one-sixth and not one-seventh, and the payments of such demands for so long a time by the defendants, was notice to the defendants that Mr. Herbert was not liable on the covenant with the defendants, and had not executed the deed of covenant, and was evidence that, by acquiescence, the defendants had waived objection to his non-execution. But Mr. Herbert's straitened circumstances (which the jury have found were known to the defendants) and his absence sufficiently account for the plaintiff resorting to the six solvent defendants, leaving them to their contribution from Mr. Herbert; and this was the explanation given by the plaintiff to the defendant

(1) 2 K. & J. 174; affirmed, 8 D. M. & G. 101.

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Mr. S. Huggard, who was called as a witness for the plaintiff at the trial. He stated that the first application by the plaintiff to him for payment under the deed of covenant was by letter of the 18th of March, 1886, and his evidence is thus reported by the learned Judge:—"I observed that Mr. Herbert's name was not in the letter. I said to Mr. Fitzgerald:—"How is it that Mr. Herbert has not been applied to? I see there are only those names. You know well, he said, that Mr. Herbert is out of the country. But, I said, his estate is not out of the country. He said his estate was so embarrassed that it was hopeless to expect anything from him." This explanation was a natural one; but there was no allusion to the fact that Mr. Herbert had not executed, or been called on to execute, the deed; which the plaintiff knew, but of which the defendants respectively were ignorant until March, 1894. Actual notice of the fact there was none; nor was there constructive notice of it, within, at all events, the well-recognized limits laid down by Lord Cranworth in *Ware* v. *Lord Egmont* (1), and by Wigram, V.-C., in *Jones* v. *Smith* (2). Therefore the defendants, up to March, 1894, had neither notice nor knowledge that Mr. Herbert had not executed the deed; and, not having notice or knowledge, they could not, nor in fact did they, consent to any variation of their original contract, or acquiesce in any altered state of facts, or waive any right. This second contention for the plaintiff, therefore, also fails in my opinion.

Thirdly, it is contended for the plaintiff that Mr. Herbert's insolvent condition, as found by the jury, and the defendants' knowledge of it, renders it immaterial to the defendants whether Mr. Herbert executed the deed or not. No authority has been cited for the proposition that one party to a contract can alter the contract, without the consent of the other party, because the former party considers it immaterial to the other whether or not it is so altered. *Cooper* v. *Evans* (3) is not an authority for that proposition. There both sureties executed the bond; the principal debtor executed a separate instrument; the rights of the surety were unimpaired; the form of enforcing them only was altered;

(1) 4 D. M. & G. at p. 473. (2) 1 Hare, 43. (3) L. R. 4 Eq. 45.

and the surety had previously set up the same case at law and had failed in it.

If Mr. Herbert had executed, each defendant would have been entitled, from time to time—see *Gardner* v. *Brooke* (1), following *Wolmershausen* v. *Gullick* (2),—as he overpaid his quota, to the advantage of a covenant under seal (which having regard to the statute of limitations was important) to enforce contribution from Mr. Herbert; and it cannot be predicated of him that he will not hereafter be solvent. Even on the evidence of his agent, who was examined at the trial, one of the incumbrances on his estate is a heavy jointure, which is a terminable charge.

In my opinion, therefore, the finding of the jury is not an answer to the defence, and I think the third contention for the plaintiff also fails.

Lastly, it was contended for the plaintiff that, even if he could not recover in this action on the deed of covenant of 1883, he is entitled to recover on the agreement of 1881, which was signed by all the parties. This contention was rested on the authority of *Walsh* v. *Lonsdale* (3); but that case merely decided that, since the Judicature Act, the position and *status* of a tenant, who enters under an agreement for a lease, is the same at law and in equity, and that he holds on the terms of the agreement as if the lease had actually been executed; but neither that case nor the equitable maxim, that what is agreed to be done must be considered to be done, have any application to the present case. The agreement of 1881 was not made with the plaintiff; it was an undertaking for sufficient consideration by its subscribers, pursuant to statute, with the extraordinary Presentment Sessions, through the Tralee and Feenit Commissioners, to enter into a deed of covenant with the plaintiff on behalf of the guaranteeing baronies; it was not, nor was it intended to be, the security which the Sessions agreed to accept. That security was a contract by deed of covenant between the plaintiff and the defendants, viz. the deed of covenant of 1883, on which the plaintiff has brought the present action; but that deed was conditional upon its being executed by all the parties of the first part who were on the face

(1) [1897] 2 Ir. R. 6. (2) [1893] 2 Ch. 514. (3) 21 Ch. D. 9.

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of it represented as intending co-covenantors. The condition was not fulfilled, and the deed sued on never was operative as a deed. Neither in form or substance is the present action brought on the agreement of 1881, which only appears in the Statement of Claim as part of the narrative leading up to the deed sued on.

If the action had been framed on that agreement, and if that was the case the defendants were impleaded to meet, it might have been contended possibly by the defendants that no such action lay against the defendants; further, if it did, that the defendants were always ready and willing to perform the agreement, as the plaintiff always had notice; and that it was owing to the plaintiff's neglect and default that it had not been carried into execution. I therefore think that the last contention for the plaintiff fails.

For these reasons I am of opinion that judgment should be entered for the defendants, with costs in the original action. The counterclaim for repayment of the money paid by the defendants has not been argued, and appears to have been given up by the defendants. If so, the judgment for the plaintiff on that part of the counterclaim should stand.

HOLMES, J:—

It is, I think, unnecessary to examine in detail the peculiar and somewhat complicated provisions of the three statutes of 1880, in which the transactions that led to this litigation originated.

It is enough to say that pursuant thereto, certain baronies, in Co. Kerry, were duly charged, by way of guarantee, with the repayment of a loan made by the Board of Works to the Tralee and Feenit Harbour Commissioners. The statutes authorise the Baronial Sessions, by which the guarantee was given, to agree with the borrowers for a counter-security to the baronies, and enacted that such security might be taken, on behalf of the baronies, by the secretary of the Grand Jury, who was created a corporation sole for this purpose. With this provision in view, the Harbour Commissioners, who as a body corporate were without assets, present or prospective, had a memorandum signed by seven gentlemen living in the neighbourhood and interested in the project, by which the executing parties undertook, in the event of the guarantee being given, to enter into a deed of covenant, by

which they would jointly and severally covenant with the secretary of the Grand Jury that, if, when, and so often as, the baronies should be called on to pay any sum of money on foot of the guarantee, they would forthwith pay to the County Treasurer one-nineteenth of the said sum. This document, which bears date the 28th September, 1881, was laid before the Baronial Sessions held immediately after its execution, and there is no doubt that it had some effect in procuring the presentments for the guarantee.

Nothing seems to have been done towards preparing the security mentioned in the memorandum until September, 1882. In that month, Mr. Richard Huggard, the solicitor for the Harbour Commissioners, handed the memorandum to Mr. Downing, the solicitor of the Grand Jury, for the purpose of having the deed of covenant prepared by Mr. Downing, but it does not appear clearly from the evidence whether he or Mr. Richard Huggard had it engrossed. Four of the parties to it executed it in Mr. Downing's office; two of them executed it elsewhere; and it was never executed by the seventh, Mr. Herbert. It bears date the 9th of March, 1883, but there is no reason to suppose that all the executing parties signed it on that day, and they certainly did not do so at the same time or in the same place. Mr. Herbert remained in Ireland up to April, 1882. He then went to England, where he lived almost continuously for a year. From the spring of 1883 to the summer of 1894 he resided for the most part in America, paying only occasional visits to this country, the longest of which was one of two or three months' duration towards the close of 1883. Beyond a letter of 18th December, 1882, from Mr. Downing to Mr. Herbert, to which there was no reply, no effort seems to have been made to have the deed executed by that gentleman. There is no doubt that, even at the date of the memorandum, he was in pecuniary difficulties; and that at no period subsequent thereto, would a security given by him have been of much value. The money advanced by the Board of Works was repayable by instalments; and the first occasion on which the baronies were called on to make good their guarantee appears to have been at the Spring Assizes, 1886. A letter was then addressed by the secretary of the Grand Jury to

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each of the six covenantors in the deed, calling on them to pay the contribution of one-nineteenth mentioned in that instrument. I have not before me copies of this, or of the many subsequent letters to the same effect written by the plaintiff to the defendants; but, according to my recollection, they all state that the amount is due, in conjunction, by the six persons whose names are given, Mr. Herbert's name being on all occasions omitted, and there being nothing to show that he was included in the liability. The gentlemen thus applied to paid, with more or less punctuality, the amounts demanded from them in the proportions of one-sixth each down to the year 1894, when Mr. Stephen Huggard, one of the defendants, discovered, accidentally, that Mr. Herbert had never executed the deed. The defendants were, thereupon, advised that the covenant could not be enforced; and, after an offer of compromise, which the Grand Jury did not feel itself at liberty to accept, they repudiated all liability.

The present action has been brought against five of the covenantors who are alive, and the administrator of one who is dead. The statement of claim treats the six executing parties as bound in severalty; and, anticipating the defence, it alleges that the execution of the deed by Mr. Herbert was waived by the others, each of whom executed it with the full knowledge that Mr. Herbert had not done, and would never do so. This allegation is denied by the defendants, who rely upon the fact that what was contemplated by all parties interested, was a deed in which seven persons were to be jointly bound, as well as each of the seven bound in severalty, and that the execution, by one of the parties, could not impose on him a several obligation, unless and until the original intention was carried out by all the seven joining in the instrument. There is ample authority for the legal proposition which lies at the foundation of this defence. Many cases have been mentioned, but it is almost sufficient to refer to one. *Evans* v. *Bremridge* (1), was decided by Lord Hatherley when Vice-Chancellor, was affirmed on appeal, and has been since repeatedly followed without hesitation or question. There a sum of money was advanced by an Assurance Company to a policy-holder upon

(1) 2 K. & J. 174; 8 D. M. & G. 101.

the terms that he would procure two solvent persons to join him in covenanting for the repayment of the loan. The plaintiff consented to become one of the sureties; and a deed of covenant was executed by him and the principal debtor, but the other proposed surety, although named as a party, never executed it. By its terms the borrower and the two sureties purported to covenant jointly and severally that payment should be made by instalments by them, or some or one of them, there being thus a striking resemblance to the deed of security or indemnity given in the present case to the secretary of the Grand Jury. The plaintiff discovered, nearly a year after the deed had been executed by him, that it had not been executed by the other surety; and, on being sued in a common law court by the assurance company, he pleaded an equitable defence based on the foregoing facts, which was demurred to. He did not, however, wait for the argument of the demurrer, but filed a bill in Chancery, praying that the deed should he cancelled, and that the company should be restrained from proceeding with the pending action. The Vice-Chancellor held, that the Court ought to look at the original agreement between the parties, and see if they all intended the obligation to be joint and several between the co-sureties. He said that the deed was in that form, and was prepared and framed by the covenantees who sent it for execution to the plaintiff, thereby giving him the clearest intimation that his liability was intended to be joint and several. The Vice-Chancellor considered that it then became the duty of the Company to inform the plaintiff that the deed was not executed by his co-surety, as originally proposed, and to ascertain his view with respect to his altered position; and, being of opinion that such position was materially affected by the circumstance that the other intended surety was not bound, he gave judgment discharging the plaintiff from all liability.

Now, postponing for the present the consideration of whether the case before the Court can be distinguished from *Evans* v. *Bremridge* (1), by reason of either the written memorandum or the circumstances that followed the execution of the deed, I ask is it possible to distinguish it on any other ground? If, for example,

(1) 2 K. & J. 174; 8 D. M. & G. 101.

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the solicitor for the Harbour Board, without producing any document, had merely informed the Presentment Sessions that the seven gentlemen would secure one-nineteenth of the liability of the baronies by their joint and several deed of covenant, and if the discovery that Mr. Herbert did not execute the deed had been made before anything had been demanded or paid in pursuance of it, would not *Evans* v. *Bremridge* (1) be a distinct authority that the executing parties were entitled to repudiate the several obligation sought to be imposed on them? On the assumption I have made the two cases are identical in principle. It is true that, strictly speaking, the covenant with the plaintiff is not a simple contract of suretyship, but it is practically the same thing; it is a counter-security given to a surety. The baronies are sureties that the Harbour Commissioners will repay the Board of Works. The covenantors are in effect sureties to the baronies that the Harbour Commissioners will perform their contract of repayment. Whatever duty is due by a creditor to a person who has undertaken to become surety for his debtor, was due by the representative of the baronies to the persons who had undertaken to indemnify them from part of their liability under the guarantee. Indeed, I doubt if the decision of *Evans* v. *Bremridge* (1), rests upon anything peculiar to the law of suretyship. It seems to me to depend upon the much wider principle that, where an instrument is admittedly not such as it was intended to be by all the parties to it, no legal effect ought to be given to it. *Latch* v. *Wedlake* (2), is an old case in which the question arose whether three partners were bound by a contract signed by two of them. There were questions as to their authority to bind the third partner, and as to their own liability even if the third was not bound, but Lord Denman concluded his judgment by saying that, apart from these matters, the circumstances "raised a prior question proper to have been submitted to the jury, whether the intention of the parties was not that Rosser Thomas (the third partner), should be an actual party to the agreement; whether the plaintiff, on his part, did not contract on the faith that Rosser Thomas should join, and he thereby have his additional security for the performance of the agreement; and

(1) 2 K. & J. 174; 8 D. M. & G. 101. (2) 11 A. & E. 959.

whether the defendants, on theirs, did not execute upon the understanding that Rosser Thomas was consenting to, and would join in executing, the instrument. If the jury had so thought, the transaction would, under the circumstances found, have been incomplete; for, wherever an instrument is to be executed by several parties, there must be some interval between the execution of each; and, if all be not present at the same time, that interval may be considerable; and it cannot be contended that the mere fact of execution by one conclusively binds him where that has been done on the faith that all will execute, and any one shall refuse."

In the present case there can be no doubt it was understood by the Harbour Commissioners, the Presentment Sessions, and the seven gentlemen, that the latter were all to join in a deed of covenant, binding them jointly and individually. The solicitor who drafted the deed on behalf of the baronies settled it on this basis. The form of the document executed by six of the parties showed that execution by the seventh was contemplated. Mr. Herbert was in England at the time, and could be easily communicated with. He was in some pecuniary embarrassment, arising, no doubt, to a considerable extent from the agrarian agitation then prevalent. But he was one of the largest landowners in Ireland; and, if the relations of landlord and tenant had been restored to what they were six years before he would have been a rich man. Down to the time when the deed was executed by the last of the parties to sign it, there is absolutely nothing to suggest that the original intention was to be departed from; and the secretary of the Grand Jury, who had the custody of the document, would have seen if he had looked at it that it was not a completed instrument. In this state of things I think that the defendants would be relieved from liability under it upon the principle laid down in *Evans* v. *Bremridge* (1), unless the two cases can be distinguished by reason of the circumstances to which I am about to refer.

Three points of difference are relied upon by the plaintiff's counsel—first, the preceding memorandum; secondly, the insolvency of Mr. Herbert to the knowledge of the other parties to the

(1) 2 K. & J. 174; 8 D. M. & G. 101.

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deed; and, thirdly, the repeated demands for payment made upon the latter and their compliance therewith from 1886 to 1894.

Taking these points in the order named, it is argued, as regards the first, that the memorandum is itself a contract entered into by the seven signatories, and as such supplies a good cause of action against them. If the inference which the Court is asked to draw from this proposition is that the plaintiff ought not to fail even if we were to hold that the deed is inoperative, I am unable to accept it. The whole case, in pleadings, in proof, in argument, depends upon the deed; and, if the deed goes, there is an end of the present action. Indeed the contrary view was only advanced somewhat delicately, and Mr. Meredith seemed to abandon it altogether, using the previous contract to support the subsequent instrument, not as a substitute for it. By that contract, he said, the signatories bound themselves that they would all execute the deed of covenant, and thereupon it became the duty of each not only to execute it himself but also to have it executed by the others. How, then, can any one of them escape liability by showing that another did not execute, when he was himself party to a contract that the deed should be executed by all? Can he claim equitable relief when he is in reality taking advantage of his own default?

This is, undoubtedly, a plausible argument; but I doubt its soundness. In all cases of this kind the impeached instrument has sprung from some previous arrangement by reference to and comparison with which it is shown that the intention of the parties has not been carried out. But such an arrangement, though often called an agreement, is not as a rule a contract. It is an understanding arrived at by the parties with the view to a contract; but does not in itself import any legal obligation. Is the memorandum more than this? The only way in which the baronies could be counter-secured is that mentioned in the statute, that is, by the secretary of the Grand Jury taking a security on their behalf. Now, the secretary of the Grand Jury was no party to the memorandum; and its contents show that it was a different document that was to be given to him. The memorandum was obtained by the Harbour Commissioners to assist them at the Baronial Sessions; but it was nothing more than an honourable undertaking

without legal efficacy. I therefore think that the foundation of Mr. Meredith's argument fails. I am prepared, however, to assume that it was a contract enforceable by the secretary of the Grand Jury. How does this improve the plaintiff's position? If, in *Evans* v. *Bremridge* (1), the two sureties had written to the assurance company promising, in the event of the loan being made, that they would join the borrower in a joint and several covenant to secure it; and if, when the money had been advanced, the deed had been executed by the borrower and one of the sureties, the other declining to carry out his promise, would the result be that the executing surety, who believed that the instrument had been completed, would not have been at liberty to repudiate the several obligation? I can only say that all the reasoning of Lord Hatherley would apply to that state of circumstances. An action, no doubt, would lie on the contract contained in the letter; but such an action would differ essentially from an action on the deed. It would be a suit either for specific performance of the agreement or to recover damages for not giving the stipulated security; and, founded as it would be on a joint liability, the executing surety would be entitled to have the defaulter sued along with him. The fallacy in Mr. Meredith's argument is the assumption that a man can be held liable on a contract, never contemplated by either of the contracting parties, by reason of his having broken another and different contract made with the same party. The remedy for a broken contract is to sue for the breach of it, not to force upon the person who has broken it a new obligation into which he never entered.

The second point relied upon by the plaintiff is the insolvency of Mr. Herbert. Although this was the subject of much attention during the trial, and the only part of the case left to the jury, no attempt has been made to show the materiality of the findings on this issue. Assuming that it would be a good answer to the defence and counterclaim to establish that the defendants are not prejudiced by Mr. Herbert not having executed the deed, this cannot be done by proving his insolvency in the past. He was once a wealthy man, and it is possible that he may be so again,

(1) 2 K. & J. 174; 8 D. M. & G. 101.

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long before liability under the deed of covenant has come to an end. I can understand his pecuniary position to be a reason for the defendants waiving their right to have the deed executed by him, but this is a different question from the issue found by the jury, and brings me to the last matter urged by the plaintiff's counsel.

I have already said that, down to the time when the deed was executed by six of the intended covenantors, there is no evidence to show that it was not contemplated by all parties that it was to be completed by its execution by the seventh. The carriage of this instrument was undertaken by the plaintiff and the Harbour Commissioners, whose position corresponded with that of the creditor and principal debtor; and it seems to me to have been just as much the duty of the former, who had all along the custody of the document, as it was the duty of the assurance company in *Evans* v. *Bremridge* (1), to let the proposed sureties know that one of their number had failed to give the stipulated security. It is not, however, to be supposed that the defendants' right to repudiate liability springs from this breach of duty. Knowledge on their part was material to enable them to consider their altered position—in other words, to consider whether they would accept or repudiate liability. Once they had the right to repudiate, it seems to me that they could not lose it until they had an opportunity to make this election. Of course if, after they became aware that the execution of the deed by Mr. Herbert could not be obtained, or if, after they had grounds for believing that he would not execute it, they acted on the document, a jury ought to infer that they thereby waived the right; but, as long as they entertained a reasonable and honest belief that he had executed it, the inference of waiver could not arise. Now there is no evidence that the plaintiff ever informed any of the signatories that Mr. Herbert had not joined or was not expected to join. The only evidence of such knowledge on their part was the letters from the plaintiff omitting Mr. Herbert's name and treating the other six as jointly liable for the whole contribution. Two of the defendants swear that they called the attention of the plaintiff to the fact that Mr. Herbert

(1) 2 K. & J. 174; 8 D. M. & G. 101.

had not been applied to, and that the explanation given was not that he was not bound, but that he was out of the country. This is not contradicted by Mr. Fitzgerald. All the defendants who were parties to the deed swear positively that they always believed that Mr. Herbert was bound. Would a jury be at liberty, merely upon the form of the letters of application, to disregard this evidence, and to find that, by making payments which under the circumstances it was natural for them to make whether Mr. Herbert was jointly liable or not, they had waived their right to impeach the deed? I would have been disposed, had I been myself trying the case, to leave this question to the jury. To do so would probably have put an end to the litigation, as far as this point is concerned, for beyond doubt the weight of evidence was with the defendants. I have, however, a difficulty in saying that there is absolutely no evidence the other way, and, if counsel for the plaintiff had asked the Court for a new trial upon this point, I might feel myself obliged to give a reluctant assent. But no such application has been made. Both at the trial and in the argument before this Court the plaintiff has claimed a verdict and judgment on the case as it stands; and, although Mr. Wright has laid great stress upon the letter to the defendants, and their payments, he has not suggested that an issue of fact is raised thereby. He used this part of the case to assist the Court in deciding the question of law by showing that the defendants have no merits. There is no doubt a temptation to make law and merits harmonize. I would, perhaps, be more inclined to yield to it, were it not that merits alter with every case, while legal principles are abiding. Now I should be sorry to suggest that there is anything unmeritorious in the effort of the defendants to relieve themselves from this annual payment; but, even if there were, it ought to make no difference in our judgment. The bad law which is supposed to work justice to-day is sure to work injustice to-morrow; and the Chinese proverb, that tells us of curses like chickens coming back to roost, is equally applicable to unsound decisions.

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SIR P. O'BRIEN, L. C. J. :—

After considerable hesitation, I have arrived at the conclusion that verdict and judgment should be entered for the defendants. It is not necessary to go into the general facts of the case; they have been most fully referred to by my brethren. In my opinion, the *crux* of this case arises on the third and fourth paragraphs of the Statement of Claim, which have been expressly admitted by the Defence. The third paragraph of the Statement of Claim states that these seven gentlemen, who were interested in this pier, agreed, by a memorandum in writing, that, if the baronies named would guarantee the repayment, with interest, of the sum of £95,000, they would enter into a deed of covenant, by which they would jointly and severally covenant, for themselves and their respective heirs, executors, and administrators, with the secretary of the Grand Jury of the county of Kerry, under the provisions of the 14th section of the Relief of Distress (Ireland) Amendment Act, 1880, in such manner as the Presentment Sessions should require, that, if, and when, and so often as, the baronies should be called on to pay any sum or sums of money, they would pay a certain specified amount, which was to be applied in relief of the baronies.

This is what, in substance, is stated in the third paragraph. What does the fourth paragraph state? This, that on the faith of the agreement contained in the third, the baronies duly presented and gave the required guarantee for the repayment of the said sum of £95,000. This is expressly admitted to be the fact. How then stood the matter so far? In this way. The seven gentlemen—six of them being the defendants—undertook that they would enter into a covenant to counter-secure the baronies in the specified amount. The effect of this agreement was to impose the duty on each of these gentlemen, not only to execute the covenant himself, but also to have it executed by the others. This was undoubtedly their moral obligation, and I shall assume, for the moment, that it was a legal as well as a moral obligation.

The guarantee from the baronies having been obtained on the faith of this undertaking, the Board of Works advanced the £95,000 on the faith of the undertaking and guarantee. Imme-

diately after the Presentment Sessions were held, and the guarantee given, Mr. Herbert left the country. The deed of 1883, on which the action is founded, was prepared by Mr. Downing. No question was put to the jury, nor indeed raised at the trial, as to any laches on the part of Mr. Downing in getting Mr. Herbert to execute. Evidence was given as to whether he had told the defendants that Mr. Herbert had not executed, and whether they knew it as a fact; but this, as I understand it, was with reference to the question of waiver which was raised upon the pleadings. Mr. Downing endeavoured to ascertain where Mr. Herbert was. He appears to have gone to America, and seems to have been in a somewhat migratory mood; and, when ultimately asked to sign the deed, he replied that he was advised not to do so. His attitude in connexion with the matter was certainly of a remarkable character. His services were appraised and rewarded with singular generosity in the manner described by Mr. Huggard with such conspicuous candour and so much *naïveté*. He helped to get £95,000 from the Board of Works for the Harbour Commissioners on the faith of an undertaking by him and the defendants, that they would enter into a certain covenant of partial indemnity; and it is now insisted that, by reason of his refusal to make good his undertaking, he has freed the defendants, who were his co-undertakers, from all liability—that, the deed of indemnity being executed by six instead of the seven persons originally contemplated, each of those six who did execute it is entitled to say, *Non hæc in fœdera veni*. Mr. Bourke insists that Lord Hatherley's judgment in *Evans* v. *Bremridge* (1), is conclusive. In that case I cannot find anything tantamount to the preliminary agreement of September, 1881. That, in my opinion, is the all-important factor in this case: but what did Lord Hatherley say? He said that the deed was good at law. In my opinion there is no ground here for saying that the deed was an escrow, or executed by the signatories to it on any condition that would make it invalid at law unless signed by Mr. Herbert. After referring to the case of *In re Semple* (2), decided by Lord St. Leonards, Lord Hatherley says:—"So here, the deed is good at law. Not having

(1) 2 K. & J. 174; 8 D. M. & G. 101. (2) 3 J. & L. 488.

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delivered the deed upon the condition of its being executed by the co-surety, the plaintiff is bound at law to pay the whole amount; but the question is, What is its effect in equity"? This is the language of Lord Hatherley. What equity is there to alter the legal effect of this deed? If the agreement of September, 1881, was a binding, enforceable, agreement, I should answer, None, because the non-execution by Mr. Herbert would be the result of a breach of the defendants' agreement to get all the persons who were parties to that agreement to execute the covenant of indemnity—in fact, to allow such an equity in relation to the deed of covenant would be to permit a man to take advantage of his own default, in relation not only to that very deed, but to the very matter in reference to which he founds his equity, viz. the non-execution by Mr. Herbert. But is the agreement of September, 1881, of legal efficacy? Is it enforceable? I feel that it ought to be, but I cannot see that it is. It served its purpose, namely, to induce the Presentment Sessions to give the guarantee. It offends one's sense of justice that the signatories to this document, having achieved their object by it, should not be legally bound by it. It is drawn with as much legal formality as the circumstances of the occasion permitted. It commences, "In consideration that," and winds up, "In witness, &c." But the baronies cannot contract. The Presentment Sessions were dissolved when the purpose for which they were convened was accomplished. Could the secretary of the Grand Jury enforce it? No doubt an instrument need not be expressed to be *inter partes* to be enforceable: but it was to the Baronies and Presentment Sessions, and not to the secretary of the Grand Jury that the signatories gave an undertaking that they would enter into a covenant with the latter. Nor can I collect from the statute that any power or authority is conferred on the secretary of the Grand Jury to enforce this preliminary agreement. This agreement not being enforceable, the case is practically governed by *Evans* v. *Bremridge* (1), and I therefore agree in the result which has been arrived at by my brethren.

Reference has been made to Lord Hatherley's statement in

(1) 2 K. & J. 174; 8 D. M. & G. 101.

Evans v. *Bremridge* (1), that it was the duty of the Company to inform the plaintiff that the deed was not executed by the co-surety as originally proposed. I should hold in this case, if the agreement of 1881 was binding, that no such duty existed here—in fact, that it would have been the duty of the defendants to have seen that the deed was executed.

One matter more. I have observed that, in their equitable defence, the defendants deal with the agreement of 1881 as binding—in fact, they make it the basis of their equity to the relief they seek. They allege that Mr. Herbert was bound by that agreement, and that it was the action of the plaintiff that absolved them from their bargain with him. However, we are, I think, bound to give judgment according to what our opinion is of the true legal aspect of the entire case.

Order accordingly (2).

Solicitors for plaintiff: *F. C. Downing & Sons.*
Solicitors for defendants: *J. Creagh; O. H. M'Cowan.*

A. E. R. J.

(1) 2 K. & J. 174; 8 D. M. & G. 101.
(2) [See *Ellesmere Brewery Co.* v. *Cooper* (1896), 1 Q. B. 75.]

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Nov. 10.

HOSFORD, Appellant; DEVINE, Respondent (1).

Summary jurisdiction—Costs—Prosecutions under the Fishery (Ireland) Acts—Fishery (Ireland) Acts (5 & 6 *Vict. c.* 106, *s.* 94; 13 & 14 *Vict. c.* 88, *s.* 54; 26 & 27 *Vict. c.* 114, *s.* 43)—*The Petty Sessions (Ireland) Act*, 1851 (14 & 15 *Vict. c.* 93), *s.* 22—*Statute—Repeal.*

The general provision of the Petty Sessions (Ireland) Act, 1851, sect. 22, enabling Justices to give costs not exceeding 20*s.* does not repeal or limit the wider special powers, conferred by 5 & 6 Vict. c. 106, sect. 94, and 13 & 14 Vict. c. 88, sect. 54, on Justices at Petty Sessions, of awarding to the successful party, in cases of complaints under the Fishery (Ireland) Acts, the costs, charges, and expenses of, and incident to, such complaints and the proceedings therein.

Case Stated for the opinion of the Court pursuant to the 20 & 21 Vict. c. 43, by the Justices of county Longford, sitting at Longford Petty Sessions.

On the 14th June, 1897, the respondent, Devine, was charged upon a summons, alleging that, on the 26th January, 1897, he had in his possession at Longford, within the Limerick fishery district, three salmon that had been caught during the close season in force for that district. The complainant was represented by Mr. O'Shaughnessy, solicitor, and the defendant by Mr. Delaney, solicitor. The summons was brought at the instance of the Fishmongers' Company of London, who were endeavouring to prevent the export to England of unclean and unseasonable fish. The fish in respect of which the summons was brought were proved to the satisfaction of the Justices by witnesses brought from England to have been seized at Holyhead enclosed in a box which had been placed in a case consigned by the defendant as "dead fowls" to a merchant in Manchester on the 28th January, 1897, during the close season for salmon in the county of Longford; and evidence was given of all other facts necessary to be proved to constitute the offence with which the defendant was charged.

(1) Before Sir Peter O'Brien, L.C.J., Palles, C.B., and O'Brien and Johnson, JJ.

The Justices (it was stated) considered the case clearly proved, and convicted the defendant, whereupon Mr. O'Shaughnessy, solicitor for the complainants, applied to the Justices that they should ascertain "the costs to which the complainant had been put, and the amount incurred for witnesses' expenses, and the other costs, expenses, and charges incident to the proceedings," and asked that the Justices should make an order for payment of such costs and charges by the defendant under the provisions of section 94 of the 5th and 6th Vict. c. 106, and section 54 of the 13th and 14th Vict. c. 88, the powers thereby conferred not having been, as he contended, taken away or limited by the provisions of section 22 of the Irish Petty Sessions Act (14 & 15 Vict. c. 93), which directed (generally) that the Justices might in all cases order that the defendant should pay such sum for costs not exceeding 20*s.* as to the Justices should seem fit. Mr. O'Shaughnessy then formally offered to the Bench particulars of these costs and expenses, amounting in all to the sum of £18, including the expenses of bringing witnesses from England. "The Justices" (the case then set out) "considered it was a proper case in which to order the aforesaid costs and expenses of the complainant to be paid by the defendant, but considered that they had no power to order any sum larger than twenty shillings to be paid by the defendant, being of opinion that the provisions of the Fisheries Acts relative to costs had been superseded by those of the Petty Sessions Act." Accordingly the Justices made the following order:—"Defendant convicted that he did between the 1st day of August, 1896, and the 11th February, 1897, both inclusive, to wit upon the 28th of January, 1897, at Longford in the county of Longford, unlawfully have in his possession three unseasonable salmon, caught during the close time, and fined the sum of £6, and to pay for costs the sum of 20*s.*, to be levied by distress of the defendant's goods and chattels, and in default of sufficient distress," etc.

The Justices then stated that they had been required to state this case for the opinion of the Court, and, having done so, to the effect above set forth, they requested the opinion of the Court upon the question—"Whether in point of law we, the Justices,

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HOSFORD, *Appellant*; DEVINE, *Respondent.*

were correct in determining that we had no power to award more than 20*s.* costs and expenses, though desiring to do so if we had such power, or as to what should be done in the premises."

Section 94 of the Fishery (Ireland) Act, 1842 (5 & 6 Vict. c. 106), provides that,—

"All offences whatsoever, which by virtue or under the authority of this Act, or of any rule, order, regulation, or bye-law, to be made pursuant to the provisions of this Act, are or shall be subject to or punishable with any pecuniary penalties, fines, or forfeitures, shall and may in every case be heard, adjudged, and determined, in a summary way by and before one or more Justice or Justices of the Peace . . ." [Then, after dealing with the procedure at the trial before the Justices, the section goes on to provide that, in case of conviction,] "the amount of such fine or fines, together with the costs of conviction, shall be ascertained by such Justice or Justices, and shall be forthwith paid . . . and in case of non-payment thereof, then the same, together with the costs of conviction and recovery, to be ascertained as aforesaid, shall and may, by warrant . . . be levied and recovered by distress and sale of the goods, chattels and effects of such offender, wheresoever the same can be found."

Section 54 of the 13th and 14th Vict. c. 88, provides that,—

"It shall be lawful for the Commissioners, Judges of Assize, Justices of the Peace, or any of the Courts in this Act, or in the said recited [Fishery] Acts mentioned, where any complaint, suit, action, or indictment shall have been heard or tried and determined before them respectively under this Act or the said recited Acts, to order that the costs, charges, and expenses of and incident to such complaint, suit, action, or indictment, and the proceedings therein, and the hearing, or trial and determination thereof, shall follow the event of the same respectively, and be borne and paid, by the party against whom the same shall have been determined, and that such costs, charges, and expenses shall be estimated, either as between party and party, or as between attorney and client, at the discretion of such Commissioners, Judges, Justices, or Courts respectively;" and then follows a provision for the mode of their recovery.

Section 22 of the Petty Sessions (Ireland) Act, 1881 (14 & 15 Vict. c. 93), provides that,—

"In all cases of summary jurisdiction it shall be lawful for the Justices in adjudicating thereon to exercise the following general powers, whether the

same shall be authorized by the Act under which the complaint shall be made or not.

. . . . . .

"Sub-section 9. In all cases the Justices may order that the defendant shall pay to the complainant, or in case of a dismissal, that the complainant shall pay to the defendant, such sum, not exceeding twenty shillings, for costs, as to such Justices shall seem fit, and the same shall be recoverable in the same manner as any penalty or other sum adjudged to be paid by the Justices."

Section 43 of the same Act provides :—

"The following Acts and parts of Acts . . . shall be repealed . . . [setting out the earlier statutes regulating procedure before Justices], and all other Act or Acts, or part of Acts, which are inconsistent with the provisions of this Act, except as to proceedings now pending to which the same or any of them are applicable." (1)

H. Conner (*The Attorney-General* (*The Rt. Hon. John Atkinson*, *Q.C.*), with him), for the prosecutor in the Court below :—

The question in the case is simply whether, in such prosecutions as the present under the Irish Fishery Acts, involving as they do very considerable expense to the parties concerned, the Justices at Petty Sessions have, by force of section 22 of the Petty Sessions Act of 1851, been deprived of the wider powers conferred on them of awarding full "costs, charges, and expenses" to the successful party, under 5 & 6 Vict. c. 106, s. 94, and 13 & 14 Vict. c. 88, s. 54.

Section 22 of the Petty Sessions Act is a general affirmative enactment, intended to cover all cases, that is, cases where no power, or a more limited power to give costs had previously existed ; but not intended to limit or repeal prior special powers created for special purposes by earlier statutes dealing with a particular subject-matter. The test is whether there is any inconsistency between these provisions of the Fishery Acts and sect. 22 of the Petty Sessions Act. It is submitted that there is none. The fishery code, except as to mere matters of procedure, still stands by itself, and the reasons are obvious why not only the penalties it enacts, but also the costs of proceedings thereunder

(1) The Statute Law Revision (Ir.) Act, 1875, repeals s. 43, and the enactments it had expressly so repealed.

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should be on a different scale from that of the penalties and costs in ordinary cases. The precise point now raised was discussed in *The Queen* (*Kirk*) v. *Justices of Meath* (1), and, though the case was decided on another ground, it would appear that, during the argument, both Chief Justice May and the late Lord Justice Barry took the view now contended for—that these particular provisions could not be held to be swept away by a general enactment unless the two statutes were so contrary that they could not stand together. The same test was applied to the construction of the Petty Sessions Act, as regards its effect on earlier legislation, by the Lord Chief Baron in *Jones* v. *Barry* (2), followed in *Forth and Rathvilly Presentments* (3). It is to be remarked that in *Devonshire* v. *Foott* (4) the costs awarded by the Justices were £5, and, though the case went to the Exchequer Chamber, no objection was ever taken to the amount of the costs.

The provisions as to costs in the Fishery Act of 1863 (26 & 27 Vict. c. 114), sect. 43, even if, perhaps, they do not apply to a prosecution before Justices at Petty Sessions, apply to some of the other cases mentioned in sect. 54 of the 13 & 14 Vict. c. 88; and, inasmuch as this section adopts and follows the very words of the Act 13 & 14 Vict. c. 88, "costs, charges, and expenses of and incident to . . . the proceeding," it is evident that the Legislature never contemplated that the special provisions of the existing Fishery Acts had been in any way superseded by the statute passed meanwhile in 1851.

The general principle that should guide the Court upon questions of this kind—that a general affirmative statute is to be construed as not repealing an earlier particular enactment directed towards a special class of objects—is well settled: see Maxwell on Statutes (Ed. 1896), pp. 234, 244, citing *Garnett* v. *Bradley* (5); *Hasker* v. *Wood* (6); *Reeve* v. *Gibson* (7); *Reg.* v. *Huntley* (8); *Guy* v. *Matthews* (9); and *Reg.* v. *Hellier* (10).

(1) Fishery Cases, 3rd May, 1877.
(2) 23 Ir. L. T. R. 28; Crimes Act Cases, 1877, p. 202.
(3) 23 Ir. L. T. R. 33.
(4) Ir. R. 2 C. L. 514.
(5) 3 App. Cas. 950.
(6) 54 L. J., Q. B. 419.
(7) [1891] 1 Q. B. 652.
(8) 3 Ell. & Bl. 172.
(9) 4 B. & S. 425.
(10) 17 Q. B. 229.

There was no appearance for the respondent.

SIR P. O'BRIEN, L.C.J.:—

In this case we are all of opinion that the magistrates had power to give full costs. Mr. Conner, who argued the case with great ability, referred us to section 94 of the 5th and 6th Vict. cap. 106, and showed that by this section and by section 54 of the 13th and 14th Vict. cap. 88, the Justices undoubtedly possessed a special power, in cases under the Fishery Acts, to award such costs, charges, and expenses as they thought fit. The question is whether the 9th sub-section of section 22 of the Petty Sessions Act has limited their authority, as to costs, to twenty shillings in all cases, including proceedings under the Fishery Acts. We are of opinion that this is not so. The Petty Sessions Act is an affirmative general enactment, and therefore does not repeal a previous special statute not inconsistent therewith. The Petty Sessions Act is an enabling statute, containing general powers, and where it is not inconsistent with a prior particular Act, it cannot be taken to supersede or repeal it. There is not, in my opinion, any such inconsistency here. The Justices still possess the same authority and discretion as they had before to award such costs, charges, and expenses, as they think fit, in cases under the Fishery Acts. Upon this short ground, we are all of opinion that the Justices were wrong in their determination, and the case must be remitted to them with our opinion to that effect.

PALLES, C.B.:—

This is the simple case of a prior particular statute and a subsequent general statute, and no express repeal. The rule of construction in such cases is well settled, and is that the later general enactment does not repeal the prior particular statute. There is no inconsistency between the two; both can stand together. In all cases where a statute does not authorise any costs to be given, or where the costs thereby authorised are under twenty shillings, the section of the Petty Sessions Act applies, and authorises costs to the extent of twenty shillings; but it does not take away

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any larger powers previously existing of giving costs in particular cases.

O'BRIEN, J.:—

I concur.

JOHNSON, J.:—

So do I. I do not see any necessary inconsistency between the provisions of the two statutes; they can both stand together.

Solicitor for the appellants: *W. F. O'Shaughnessy.*

A. E. R. J.

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June 11, 15, 16, 25.

MANNING *v.* MULLINS (1).

Practice—Equitable execution—Receiver—Pension—Royal Irish Constabulary.

The Court has power to appoint a receiver over the pension of a retired officer of the Royal Irish Constabulary. The proper form of such an order settled.

APPEAL by the Inspector-General of the Royal Irish Constabulary and Mr. Allen, the County Inspector for Kilkenny, against an order of the Queen's Bench Division, dated May 13, 1896, which refused an application made by the appellants to set aside an order made in this action, and dated Nov. 25, 1895, whereby the plaintiff was appointed receiver, without salary, of the beneficial interest of the defendant in a pension of £48 7*s.* 2*d.*, payable to the defendant as a retired sergeant of the Royal Irish Constabulary, but limited to the receipt thereout of £2 per month, to the extent, and to answer in payment of the plaintiff's judgment debt in this action, upon his entering into security in the usual manner.

Wright, Q.C., and *Morphy*, for the appellants:—

A pension of this sort cannot be reached by an order appointing a receiver. The power given by sect. 28, sub-sect. 8, of the Judicature

(1) Before LORD ASHBOURNE, C., PALLES, C.B., and FITZGIBBON, BARRY, and WALKER, L.JJ.

Act should only be exercised where the subject matter is peculiarly the sphere of the Court of Equity: *Harris* v. *Beauchamp* (1), *Holmes* v. *Millage* (2), *Re Shephard* (3), *Manchester and Liverpool District Banking Co.* v. *Parkinson* (4). The judgment in this action could not be enforced by sequestration: *Hulbert* v. *Cathcart* (5). There had been a sequestration issued in *Willcock* v. *Terrell* (6). There is no power to enforce payment of the pension: *Gidley* v. *Lord Palmerston* (7), *The Queen* v. *The Lords Commissioners of the Treasury* (8), *Palmer* v. *Hutchinson* (9), *Macbeath* v. *Haldimand* (10), *O'Malley* v. *Carrick* (11). There is no jurisdiction to make the authorities subdivide the pension and pay it piecemeal.

Matheson, Q.C., and *Corvan*, for the respondent:—

Murphy v. *Green* (12) is an express decision that there is jurisdiction to appoint a receiver over pensions of Constabulary officers. Rules 3-6 of Order XLII., taken together, give to a judgment creditor all remedies formerly open at law or in equity. That is the policy of the Judicature Act: *Salt* v. *Cooper* (13). All the property of the debtor is liable, ultimately, to be appropriated to pay his debts if the proper procedure be taken. The remedies need not be exhausted one by one. There was no need to apply for sequestration as a first step: *In re Whiteley*; *Whiteley* v. *Learoyd* (14). All that is necessary is that there should be no other way of getting at the property than by a receiver: *Westhead* v. *Riley* (15). The decision in *Holmes* v. *Millage* (2) went upon the ground that there was no jurisdiction to attach future personal earnings. In *Harris* v. *Beauchamp* (1) the receiver was appointed to preserve the assets, not by way of execution. *Willcock* v. *Terrell* (6), and *M'Carthy* v. *Goold* (16) are expressly in point. *Sansom* v. *Sansom* (17) gives the form of order. It may be right that the plaintiff should

(1) [1894] 1 Q. B. 801.
(2) [1893] 1 Q. B. 551.
(3) 43 Ch. D. 131.
(4) 22 Q. B. D. 173.
(5) [1894] 1 Q. B. 244.
(6) 3 Ex. D. 323.
(7) 3 Brod. & Bing. 275.
(8) L. R. 7 Q. B. 387.
(9) 6 App. Cas. 619.
(10) 1 T. R. 172.
(11) 2 W. Ir. L. R. 39.
(12) 26 L. R. Ir. 610.
(13) 16 Ch. D. 544.
(14) 56 L. T. 846.
(15) 25 Ch. D. 413.
(16) 1 Ball & Beatty, 387.
(17) 4 P. D. 69.

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be appointed receiver over the entire pension, and that the onus of distributing the money should rest with him.

LORD ASHBOURNE, C. :—

This case derives its importance from the circumstance that it is brought before the Court of Appeal by the Constabulary authorities to test, or rather to have scrutinized, the form and effect of orders issued by the Common Law Divisions appointing receivers by way of equitable execution over the pensions of officers and constables of the Royal Irish Constabulary.

In the present case the plaintiff obtained a judgment against the defendant for £36 1*s.* 10*d.*, with £5 16*s.* costs; issued a writ of *fieri facias* on foot of the judgment, and lodged it with the sheriff who returned *nulla bona.* The defendant had been formerly a sergeant of the Royal Irish Constabulary, and on his retirement, two years ago, was granted a pension of £48 7*s.* 2*d.* The plaintiff having failed to make his judgment effective by *fieri facias*, applied to the Queen's Bench Division for equitable execution. For the purposes of this application the plaintiff swore an affidavit stating the facts, and adding that unless a receiver was appointed over the said pension, the defendant would not pay any part of the debt, and that he would be unable to recover anything on foot of the judgment. The Queen's Bench Division made an order that the plaintiff be appointed receiver, without fee or salary, of the beneficial interest of the defendant in the pension of £48 7*s.* 2*d.* *per annum*, but limited to the receipt thereout of £2 *per* month to the extent of, and to answer in payment of the plaintiff's said judgment debt, upon entering into security before the Master, and that the receiver should account before the Master.

The defendant does not question this order, but the Inspector-General of the Royal Irish Constabulary has appealed therefrom, stating all the circumstances of the method by which pensions are paid : that the fund for pensions is in the hands of the Constabulary authorities, " solely as servants and agents for Her Majesty," and urging that the Court should not interfere by order or otherwise with its disposition, before it is paid over by the Inspector-General or his sub-accountants to the pensioner, and alleging that the exercise of the jurisdiction,

if it exists, will be attended with great inconvenience to the department.

I cannot but think that the Constabulary authorities have placed too wide a construction on the order. It is not an order against them, or one which seeks, or purports, to direct the Crown, although it might, I think, be framed in a way more calculated to avoid criticism and misunderstanding. The cases of *M'Carthy* v. *Goold* (1), and *The Queen* v. *The Lords Commissioners of the Treasury* (2), are good law and good sense, and are in no way inconsistent with the intention of this order. We have already decided in this Court (*Murphy* v. *Green* (3)) that Constabulary pensions are awarded entirely for past and not at all for future services, and that therefore they cannot be protected against the legitimate demands of creditors. The pensions are assignable, applicable to meet the demands of creditors, and therefore must be capable of being reached by due process of law. I am of opinion that when there is no doubt as to the liability of pensions to the debts of the pensioners, the Court should take care to mould the order so as to enforce that liability, and not to allow mere objections to the form and verbiage of the order to interfere.

In England similar questions as to the procedure to be adopted in order to reach pensions have been considered. The case of *Willcock* v. *Terrell* (4) is of the highest importance, and I am unable to find that in any subsequent case it has been at all criticised or questioned. The plaintiff in that case had obtained judgment against a County Judge, an order for payment of the judgment by instalments of £50 each, and a committal order for default of payment of the fifth instalment. This committal order was evaded by the defendant. The defendant then resigned and became entitled to a pension of £1000 a-year. The plaintiff issued a writ of sequestration, and giving notice thereof to the Lords of the Treasury, requested them to direct a portion of the defendant's pension to be paid over to the sequestrators in satisfaction of the instalments, in respect of which default had been made. This they declined to do, but gave the plaintiff an opportunity of bringing the matter before the Court. The plaintiff

(1) 1 Ball & Beatty, 387.
(2) L. R. 7 Q. B. 387.
(3) 26 L. R. Ir. 610.
(4) 3 Ex. D. 323.

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applied for an order upon "the Lords of the Treasury or the Paymaster-General," to pay over to the sequestrators so much of the accruing pension of the defendant as would suffice to satisfy the amount then due under the order to pay by instalments, and claimed under the writ of sequestration. The application came before Lord Coleridge, C. J., and the then Mr. Justice Lindley. They both thought that there was an insuperable objection to granting the order in the form suggested by the plaintiff, inasmuch as there was no mode in which it could be enforced against the Lords of the Treasury or the Paymaster-General, who was a mere subordinate officer of the Treasury. But both the learned Judges were of opinion that the order might issue in the form approved of in *M'Carthy* v. *Goold* (1). Referring to the order made by Lord Manners in that case, Lord Coleridge says:—"I do not see that that violates any principles of law, and it enables us to do that which is manifestly just, without committing ourselves to any conflict with any other power or jurisdiction." Mr. Justice Lindley says:—"We may restrain the debtor from receiving so much of the pension as is appropriated by my Brother Denman's order to the liquidation of the judgment debt; and the sequestrators should be authorized to apply for and receive from the Treasury £50 per quarter out of the moneys which may be in the hands of the Paymaster-General applicable to the payment of this pension." The learned judge then states that he has sketched out the form of order to be made in that case, and the form so sketched has been preserved in the report. The defendant appealed, but the judgment of the Court was affirmed by Lords Justices Brett, Cotton, and Thesiger. The decision is one therefore of the very first importance. In the recent case, *Harris* v. *Beauchamp* (2), Lord Justice Davey, in his long and interesting judgment, never referred to *Terrell's Case* (3), and I am sure had no view in his mind to reflect on its authority. It was argued here, however, that the Court had no power to direct the Constabulary authorities to divide the sum payable in respect of the pension. This point was not raised in *Willcock* v. *Terrell* (3), and now that it is raised the matter can be set right. It is a matter of form only, and not of substance.

(1) 1 Ball & Beatty, 387. (2) [1894] 1 Q. B. 801. (3) 3 Ex. D. 323.

The Exchequer Division in this country have been in the habit of making orders appointing receivers over pensions of this kind, and they have adopted a form of order which is not open to this objection. The curial part of it runs thus:—"It is ordered by the Court that the said plaintiff be appointed receiver by way of equitable execution (without salary or security) over the defendant's said pension payable to him as aforesaid, and that the said receiver upon receiving the said pension shall apply the same as follows:—viz. £5 a month thereof as same shall from time to time become due to the defendant, on and after the —— day of —— next, to be retained by the said receiver in satisfaction of the said plaintiff's judgment debt, and also £2 2*s.* for the costs of this motion, and the balance of the said pension to be handed by the said receiver to the defendant." Then follow the usual directions as to accounting, &c. The objection raised here to the direction to the authorities to divide the pension does not apply to the order in that form. The form of the order should not be allowed to stand in the way of our giving effect to our view of the substance of the case.

We are of opinion that we have clear jurisdiction to make an order in the form in use in the Exchequer Division. This will entail the recasting of the order made in this case, so as to correspond with the form which I have read. I am glad that we have the counsel and assistance on this appeal of the learned head of the Exchequer Division in framing an order that will, I hope, in future be generally adopted. Subject to the alterations I have indicated, the order of the Queen's Bench Division must be affirmed.

PALLES, C.B.:—

This is an appeal by the Inspector-General of the Royal Irish Constabulary and Mr. Allen, the County Inspector for Kilkenny, against an order of the Queen's Bench Division, by which an application made by them to set aside an order of the 25th of November last was refused with costs. By the last-mentioned order the plaintiff was appointed receiver, without salary, of the beneficial interest of the defendant in a pension of £48 7*s.* 2*d.* (to which he was entitled as a retired sergeant of the Royal Irish Constabulary), but limited to the receipt thereout of £2 per month to the extent, and to answer in payment of, the plaintiff's judg-

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ment debt in this action, upon his entering into security. The order was directed to be served upon the appellants.

It was decided in this Court in *Murphy* v. *Green* (1) that the pension of a retired District Inspector of this force (which *quoad* the question for decision here, is in the same legal position as that of the defendant), was one for past services only, and was not in the nature of half-pay granted to military officers; and that it was, therefore, assignable, and capable of being made available for payment of a judgment. In that case each of the Judges before whom the appeal was heard guarded himself against expressing any opinion upon the form of the order. In particular, the Master of the Rolls said:—"We express no opinion whether, in granting a receiver, there is power to order payment by instalments, nor whether the Court has any discretion as to exempting a portion of the debtor's income from equitable execution at the instance of his creditors. These are matters which if the order is otherwise right, are in ease of the appellant." Lord Justice Fitz Gibbon added:—"We do not decide that the Paymaster's Department must act upon the order."

The main argument which was urged in support of the appeal was that cases which were decided in England, subsequently to *Murphy* v. *Green* (1) showed that the Court had no jurisdiction under the section of the English Judicature Act corresponding to our sect. 28, sub-sect. 8, to appoint a receiver over such a pension, and our attention was called to *In re Shephard* (2), *Holmes* v. *Millage* (3), and *Harris* v. *Beauchamp* (4). Two subsidiary objections, however, were also taken: the first, relying on *The Queen* v. *The Lords Commissioners of the Treasury* (5), insisted that the Court had no jurisdiction to direct payment to the receiver by the Constabulary authorities; the second denied the power of the Court to do anything which could have the effect of requiring division by the Constabulary authorities into two sums, of one indivisible gale of a pension.

It will be convenient to dispose, in the first instance, of those two subordinate objections. As to the first, it is an entire mis-

(1) 26 L. R. Ir. 610.
(2) 43 Ch. D. 131.
(3) [1893] 1 Q. B. 551.
(4) [1894] 1 Q. B. 801.
(5) L. R. 7 Q. B. 387.

interpretation of the order to suggest that it directs any payment by the Constabulary authorities. It certainly does not in express terms, nor can any such direction be implied from it. Neither of the Common Law Divisions has ever assumed such a jurisdiction; and the judgments in each of the two cases which are usually referred to as establishing the jurisdiction to make such an order as the present, viz. *M'Carthy* v. *Goold* (1), and *Willcock* v. *Terrell* (2), disclaim any coercive power against officers of the Crown as such. The order cannot put the receiver in a higher position than the defendant was, and as the defendant could not recover the pension otherwise than by petition of right, neither can the receiver, if the Paymaster of the Constabulary be advised to refuse payment to him.

As to the second objection, that the receiver is appointed over part only of each gale of the pension, I have been unable to satisfy myself that this course of procedure can be maintained. No doubt the course is a very convenient and just one; and it was the one adopted in *Willcock* v. *Terrell* (2), a decision of the Court of Appeal. In that case, however, it was not, nor, as far as I can ascertain, was it in any case challenged by the authority charged with the duty of payment; and now that it is challenged, I cannot satisfy myself that the Court has authority to do that which would involve the paymaster in the necessity of making, in two separate sums, one indivisible payment. The order, however, if otherwise unobjectionable, can be framed in the form which, for some years since, has been adopted in the Exchequer Division to prevent this very objection being taken, viz. appointing the receiver over the entire pension, and directing him to pay a specified portion towards satisfaction of the judgment, and the residue to the defendant. This, however, is matter of mere form.

This reduces the question to the real matter in controversy: has or has not the Queen's Bench Division since the Judicature Act power to appoint a receiver over a pension of such a character as to be assignable? I entertain a clear opinion that it has; and I conceive that it is an entire mistake to attribute that jurisdiction to sect. 28, sub-sect. 5 of our Judicature Act.

(1) 1 Ball & Beatty, 387. (2) 3 Ex. D. 323.

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First, it is clear that, before the Judicature Act, the Court of Chancery had jurisdiction to reach, by its process of sequestration, a pension payable by the Crown which was in its nature assignable, in order to make same available for the payment of a mere money demand. *M'Carthy* v. *Goold* (1) is an express authority to this effect.

Secondly, the High Court acquired under the Judicature Act all the power the Court of Chancery formerly had, and such power can now be exercised by any of the Divisions of that High Court in such cases as it could formerly have been exercised by the Court of Chancery. Therefore the Queen's Bench Division has now the same power as had the Court of Chancery before the Act of issuing process of sequestration, and by such process of rendering available towards satisfaction of its judgments any property which formerly could have been reached for payment of such a demand. This does not require authority in support of it, but the decision of the Court of Appeal in *Willcock* v. *Terrell* (2) is an express decision in point. I conceive that the effect of the Judicature Act is to render sequestration in a proper case a legal, as distinguished from an equitable, execution, although its origin is to be traced to a former equitable procedure. Such execution has been since that time equitable relief.

Thirdly, the fact of the persons who are charged with the duty of paying this pension being officers of the Crown raises a special difficulty, which authorizes and requires the interference of this Court by special order, in aid of its execution, in the same manner as it interferes by special order in cases where accidental circumstances would otherwise interfere with the exercise of a legal right, as where it is sought to make money which is to the credit of the defendant in another Court available towards payment of a judgment. This is the *ratio decidendi* of Lord Coleridge in *Willcock* v. *Terrell* (2). "It seems to me," he says, "that if this had been anything but a pension, and if the persons to be affected were any other than the Lords of the Treasury, there would have been no difficulty in the case. But I think these circumstances do introduce a difficulty"; and, after referring to the absence of power in the

(1) 1 Ball & Beatty, 387. (2) 3 Ex. D. 323.

Court to make an order upon the Paymaster-General, who is a mere subordinate officer of the Treasury, to pay to the sequestrators any portion of the pension, he adds that there is authority, referring to *M'Carthy* v. *Goold* (1), by which the pension might be reached by the process of the Court, and that the proper mode of effecting this was by an order restraining the defendant from receiving the pension, and directing service of sequestration upon the Lords of the Treasury. He adds:—"I do not see that that violates any principles of law, and it enables us to do that which is manifestly just, without committing ourselves to any conflict with any other power or jurisdiction."

What I have already said establishes, that if the Queen's Bench Division had made an order that, in default of the defendant paying the judgment debt before a fixed day, process of sequestration should issue against him, and had by further order, after default and sequestration issued, directed that the defendant should be restrained from receiving the pension, and that the sequstratrators "do receive" (which are the words of the order in *Willcock* v. *Terrell* (2)) from the proper officer the amount of the pension, the case would be absolutely concluded by the authority of the Court of Appeal in England.

This brings me again to consider matters of form. There was no order to pay upon a fixed day, or within a limited time; and Order XLIII., Rule 5, authorises issue of a writ of sequestration only when a person is directed "to do any act in a limited time:" and further, no writ of sequestration has been actually issued. In my opinion, neither of these matters at all affects the jurisdiction of the Court. Order XLIII., Rule 5, relates to cases in which writs of sequestration can be issued, as of course, in the office, without the special order of the Court. But the Court has jurisdiction to direct any act to be done forthwith, and that in default thereof the defendant shall be in contempt, and that sequestration shall issue. Further, instead of issuing a writ of sequestration, which is mere process, it may, by order, sequester the property of a defendant, and appoint sequestrators; and further, as the greater includes the less, it may, in case of the defendant, limit

(1) 1 Ball & Beatty, 387. (2) 3 Ex. D. 323.

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the subject matter of the sequestration, and confine it to a particular part of the property of the defendant; and if an officer be appointed over part only of that property, he is, in strictness, not a sequestrator at all, but a *quasi* sequestrator or receiver. Indeed, the distinction that appears to be taken between receivers and sequestrators is, that the former are appointed over part only, and the latter over the entire of a person's property.

For these reasons, and treating the order as being made in aid of the plaintiff's legal right to have property legally liable to his judgment subjected thereto, and without resorting to equitable principles, or treating the order as one affording equitable relief, I am of opinion that, subject to the alteration I have suggested, it was rightly made.

It is to be observed that in the first case relied on by the appellants (*In re Shephard* (1)) the subject matter was an equity of redemption in lands which formerly could not have been made available in a Common Law Court. Lord Justice Cotton, who pronounced the judgment of the Court in *Willcock* v. *Terrell* (2), was a party to the judgment there; that judgment does not, to the slightest extent, cast doubt upon *Willcock* v. *Terrell* (2), and the latter decision is expressly recognised as law by Lindley, L.J., in *Holmes* v. *Millage* (3). And it is this case of *In re Shephard* (1) which lays down the principle of the application of which *Holmes* v. *Millage* (3) and *Harris* v. *Beauchamp* (4) are no more than instances.

In the first of these cases, *Holmes* v. *Millage* (3), the subject matter sought to be attached was future earnings, and the *ratio decidendi* will be found in the following passage of the judgment of Lord Justice Lindley: "The question involved in the appeal is whether a judgment creditor is entitled to a receiver of the *future earnings* of this judgment debtor. Before the Judicature Acts it is clear that a judgment creditor had no such right The Common Law writs of execution did not extend to future income. The garnishee order did not reach it, nor was the statutory process of charging orders applicable to wages or other remuneration for personal services. The Courts of Common Law had no jurisdiction to

(1) 43 Ch. D. 131.
(2) 3 Ex. D. 323.
(3) [1893] 1 Q. B. 551.
(4) [1894] 1 Q. B. 801.

appoint a receiver. The Court of Chancery no doubt had, but the jurisdiction was confined to certain classes of cases, within which such a case as the present cannot be brought"; and that case is differentiated from the present by the learned Lord Justice in the following words:—"If the earnings could have been reached under a writ of sequestration, a receiver might have been appointed, as in *Willcock* v. *Terrell* (1); but a writ of sequestration was never issued before the Judicature Acts in order to attach a man's personal earnings." This sentence rules the present case.

The order in *Harris* v. *Beauchamp* (2), was sought to be sustained only under section 25, sub-section 8 of the English Judicature Act, similar to s. 28, sub-section 5 of our Act. It was impossible it could have been sustained as a *quasi* sequestration because the note of Mr. Justice Wright was to the effect that he appointed a receiver, not so much by way of execution, as to preserve the assets for the Court to give effect to the rights of the parties interested.

In truth, it does no more than reiterate the view of section 25, sub-section 8 of the Judicature Act, which had been laid down in *In re Shephard* (3), and applied it to the property in question there. It was not considered either in the argument or judgment there whether the property could formerly have been reached by sequestration, nor does it purport to disapprove of *Willcock* v. *Terrell* (1).

I cannot regard that as an authority upon the present question, when to do so would involve disregarding the authority of *Willcock* v. *Terrell* (1), which the English Court of Appeal did not purport to do, and in my opinion had no intention of doing so.

Subject to the slight alteration in the order which I have mentioned, and adopting some of the provisions in *Willcock* v. *Terrell* (1), the appeal should, in my opinion, be dismissed.

FITZ GIBBON, L. J.:—

I am glad to concur in the order framed by the Lord Chief Baron, because it is in aid of a legal right. The pension in question is not exempt from the debts of the person who receives it, and is property which can and ought to be made available to meet his liabilities.

(1) 3 Ex. D. 323. (2) [1894] 1 Q. B. 801. (3) 43 Ch. D. 131.

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I am also glad to concur in the order, because it gives a liberal construction to the new Rules which will carry out the intention of the Judicature Act, namely, that whatever relief a party could have got under the procedure of any Court under the old system, he may now obtain from any Division of the High Court in which his action has been rightly brought. But I still have the difficulty which I felt when this question was before the Court in *Murphy* v. *Green* (1), namely, that though we disclaim any intention to make an order against the Paymaster's Department, we are making an order which will be of no practical use unless and until that Department acts upon it. But the same objection lay against the order made in *Willcock* v. *Terrell* (2), and I do not anticipate that, when the defendant's pension has been held to be available for the payment of his debts, a government department will refuse to pay the money in accordance with legal right. If the payment was refused, the pension probably could not be reached without a petition of right, which would raise questions of a highly difficult and technical nature. But I hope that this objection is merely theoretical, because the order as now settled will enable justice to be done without inconvenience to the paying department. The Constabulary authorities were right to test the matter of substance by this appeal, and although they have failed to show that Constabulary pensions are inalienable, they have gained a great practical advantage by the modification of the form of the order. Serious departmental inconvenience would arise if, from being a paymaster's department, the Constabulary office was turned into an office for liquidating the debts of impecunious pensioners, subject to the duty of reserving a provision for their wives and families. The order, as modified, will leave only one person to be paid—a person outside the department, who will be able to give a single receipt, and who will be accountable for the proper application of the money.

BARRY and WALKER, L.JJ., concurred.

(1) 26 L. R. Ir. 610. (2) 3 Ex. D. 353.

PER CURIAM :—

The order of the Queen's Bench Division of the 25th day of November, 1895, must be varied, as follows :—

"IT is ordered that the defendant be restrained from receiving the moneys payable or to become payable to him in respect of the said pension of £48 7*s.* 2*d.*, until further order, and that the plaintiff be appointed receiver (without fee or salary) of the beneficial interest of the defendant in the said pension, upon entering into security before the Master of this Division, in such amount and mode as shall satisfy the said Master, and that the receipt of the receiver for the gales of pension for the time being payable shall be a sufficient discharge to the department or officer making such payment; and it is further ordered that the said receiver do retain the sum of £2 out of each monthly payment of the said pension towards satisfaction of the judgment obtained in this action, and do forthwith, upon the receipt of each such payment, pay over the balance thereof to the defendant; and it is further ordered that the said receiver shall account to the said Master at such time or times as he, the said Master, shall appoint, as to the sum or sums that he shall receive, as aforesaid; and that the plaintiff do have the sum of £2 2*s.*, as and for the costs of this motion, to be added to his demand against the defendant."

Affirm so much of the order of the 13*th day of May*, 1896, *as directs that the costs of the motion in the Court below be paid to the plaintiff by the Inspector-General of Royal Irish Constabulary, and the said Henry A. Allen, County Inspector of the Royal Irish Constabulary, when taxed and ascertained; and let the parties respectively abide their own costs of this appeal* (1).

Solicitor for the appellant: *Sir Patrick Coll.*
Solicitor for the respondent: *Buggy.*

G. Y. D.

(1) See *Molony* v. *Cruise*, 30 L. R. Ir. 99.—[REP.]

Q. B. Div. 1897.

June 25, 29.

LYNAM, Appellant; O'REILLY, Respondent (1).

Licensing law—Club—Intoxicating liquors—"Sale by retail"—Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 3.

The "Phœnix" Club was started in 1892, under a president, treasurer, a committee of management, and a manager. The manager (the defendant), who was owner in fee of a house in Dublin, had made a parol letting of certain rooms therein to the club. The club did not prosper financially, and in March, 1894, the members, at their annual meeting, passed a formal resolution, which was entered in the minute book, that the future control of the club be placed in the hands of the manager conditionally that he received the profits as remuneration for his services if he conformed to the requirements of members and paid all expenses, rent, attendance, gas, &c. From this time onward no minutes were kept. The club was carried on by the manager "at his own risk." He received the entrance fees and subscriptions for membership and the profits. The issue of cards of membership and the entire management of the premises was under his control, and he supplied liquor "at the club tariff." On case stated in a prosecution for the sale by him by retail of intoxicating liquor without a licence:—

Held, that there was no evidence to sustain a finding that this was a *bona fide* club, in which the "members" had any common property or interest in the exciseable articles supplied to them; nor evidence to sustain a finding that there was any tenancy existing between the "manager" and any person or persons on behalf of the club; nor any evidence of the admission as members of the alleged club of the persons to whom the defendant (the "manager") had supplied drink; and that the defendant should have been convicted of the offence.

Graff v. *Evans* (8 Q. B. Div. 373) distinguished.

Case Stated, pursuant to 20 & 21 Vict. c. 43, for the opinion of the Court by Mr. Wall, Q.C., Chief Magistrate of the Dublin Metropolitan Police District, on the hearing before him of several complaints (which by consent were heard together) against the respondent for having on the 31st January, 1897, and on other dates, sold intoxicating liquor by retail at No. 84, Marlborough-

(1) Before Sir P. O'Brien, L.C.J., and O'Brien and Johnson, JJ.

street, Dublin, without being duly licensed for the sale of such liquors by retail.

The case stated that "at the hearing of the said complaints the parol evidence set out in Appendix A. was given and" the minutes, rules, and notices of the Phœnix Club set out in Appendix B. were given in evidence, and continued:—"The following were the facts proved at the hearing in reference to each of the complaints respectively." This statement was to the effect that on the dates in question the complainant (appellant) had visited the premises in Marlborough-street (The "Phœnix Union" or "Club") and had found the defendant there serving drink to a number of persons present, these persons being either members, or strangers introduced by members. "The defendant was not licensed to sell intoxicating liquor by retail, and the money paid was the price fixed by the Club to be paid by members for such drink." One visitor present on the 7th of February (Byrne) "stated that he was not a member and that he had taken some drink in the place and had paid for it." The complainant took down the names of the persons present on each occasion. "The defendant supplied all these drinks to the members of the Club only, for themselves and their visitors; and received payment from the members only, and the names of all visitors and the members who brought them were entered in the visitors' book. Byrne did not pay for anything."

The case then continued:—The "Phœnix Social and Literary Union," also known as the "Phœnix Club," was formed by a number of persons, most of whom were also members of the North City Loan and Investment Society. On the 10th of October, 1892, the promoters elected a president, treasurer, and the defendant as manager, also a managing committee and sub-committee, the latter consisting of the president, treasurer, and the defendant as manager. The committee took the drawingroom floor of the house, 84, Marlborough-street, from the defendant, at the rent of £1 a-week. They immediately gave notice to the Excise and the police authorities, representing that the Union or Club intended to keep exciseable articles for the use of the members, and they procured exciseable articles for the use of the members, and

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renewed the supplies from time to time, usually twice a-week, and paid for them out of the funds of the club. The club was regulated by rules sanctioned by the committee, some of which were printed or written, and others not so, but observed in practice. The club was conducted uniformly in compliance with its written and unwritten rules and practice. The members were elected by the committee and paid five shillings a-year, but if elected after the middle of the year the subscription was 2*s.* 6*d.*, and, after election by the committee, and after payment, each member became entitled to all the privileges of the club, and to obtain the exciseable articles supplied from time to time for the use of the members on paying the price fixed for the same by the committee. By the rules each member was entitled to introduce guests and supply them with liquor, the names to be entered in the visitors' book. The committee held meetings, and minutes were kept and proved, and accounts and balance sheets were submitted and duly audited each year until 1894, showing the income and outgoings of the club; and lists of the members were produced and proved up to last year; but the list of members for the present year was not made out yet. In the year 1893, in order to requite the defendant for his services as manager, the committee recommended that for the next twelve months the profits arising from membership fees, bar, billiards, and card-room, should be given to the manager in lieu of his services and the money lent by him, on agreeing to conduct the club on such lines and under such rules as the committee might from time to time determine; and this was adopted on the 10th of January, 1894, by the managing committee; and at the annual meeting of the Union or Club, on the 6th of March, 1894, it was unanimously resolved "as to its future control," that it should be placed in the hands of the manager conditional that he received profits as remuneration for his services if he conformed to requirements of members and paid all expenses incurred, rent, attendance, gas, &c. Since that date the defendant has continued to manage the club. The furniture is all the club property. The drink which is ordered by him as manager for the use of the members of the club is paid for by him on behalf of the club and out of the

income of the club. The manager's accounts were checked every Saturday evening and constantly through the week by members of the committee (1), and he showed his vouchers for payments. The defendant has to supply the drink he orders to the members at the prices fixed by the committee.

"For the prosecution it was contended—1, that there was no evidence of the establishment or existence at 84, Marlborough-street, on the 31st of January or 1st or 7th of February last, of any club in which the subscribers had a common property, or interest, in the exciseable articles there; 2, that there was no evidence proper to be considered by me of any letting made or tenancy created or existing between the defendant as owner and any other person or body of persons as tenants of the premises or apartments in question; 3, that there was no evidence proper to be considered by me of the admission of members of the alleged club of the persons who were proved to have been supplied as members with intoxicating liquors on the 31st of January and the 1st and 7th of February last.

"I ruled against the contention for the prosecution and found as facts:—That the Phœnix Club was a *bona fide* club, and that the club premises were belonging to the club and its members as tenants thereof; that the billiard table, piano, furniture, and fittings were also the property of the club, and that the intoxicating and other liquors were ordered originally by the treasurer and manager for the use of the club, and latterly by the defendant as manager, but were paid for out of the club funds, and were the property of the club and its members, and that each member was entitled to obtain such intoxicating drink, when ordered for and supplied to the club, from the manager at the club tariff fixed by the committee; and I found that the transactions complained of were not sales within the meaning of the Licensing Act, and accordingly on the 26th of February dismissed the complaints as to the 31st of January and the 1st and 7th of February."

The learned Chief Magistrate thereupon submitted for the opinion of the Court the question:—"Whether there was any evidence, first, of the existence at 84, Marlborough-street on" the

(1) *I.e.* from 1894 onward, but at most only verbally, as would appear by the note of the evidence appended to the Case.—[REP.]

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dates mentioned "of any club in which the subscribers had a common property or interest in the exciseable articles supplied there; secondly, of any letting made or tenancy created or existing between the defendant as owner and any other person or body of persons as tenants of the premises or apartments in question; and, thirdly, of the admissions as members of the alleged club of the persons who were proved to have been supplied as members with intoxicating liquors on" the dates mentioned, "and as to whether I was correct in point of law in my determination."

The note of the parol evidence and the copies of the minutes and rules set out in the appendices to the case are sufficiently for the purposes of this report referred to in the judgment.

Morphy, for the appellant, argued that, on the evidence, the club had ceased to be a club *bona fide* conducted as such; that the premises and the exciseable liquors sold there were the property of the defendant; that there was no evidence of any ownership of or tenancy in the apartments on the part of the so-called members, and no evidence to sustain the finding of the magistrate.

T. M. Healy and *E. A. Ennis*, for the respondent, contended that upon the facts deposed to before the magistrate it was open to him, and it was the correct view for him to take in point of fact, that the defendant had not ceased to be the manager and servant of the members and committee; that he was accountable to them and removable by them; that, upon the findings of fact of the magistrate, it was impossible to hold that there had been an illegal sale by the defendant of intoxicating liquors, and that the Court should not interfere with a decision not involving any question of law but one of fact merely.

During the argument counsel referred to *Graff* v. *Evans* (1); *Newman* v. *Jones* (2); *Bowyer* v. *Percy Supper Club* (3); *Reg.* v. *Burgess* (4).

Cur. adv. vult.

(1) 8 Q. B. D. 373.
(2) 17 Q. B. D. 132.
(3) [1893] 2 Q. B. 154.
(4) L. & C. 299; 32 L. J. (M. C.) [185.

SIR PETER O'BRIEN, L.C.J.:—

This case has been stated for our opinion by Mr. Wall, the Chief Divisional Magistrate of the Dublin Metropolitan Police District. It has been stated very fully, most appropriately, and skilfully, and raises one of the most important questions connected with the administration of the Excise Law which has for some considerable time past been presented to the consideration of this Court.

Mr. Wall informs us that he arrived at certain conclusions of fact, and the question for our determination is whether there was any legal evidence to sustain those conclusions.

It appears that a club called "The Phœnix Social and Literary Union" was established in Marlborough-street in this city in the year 1892. Its professed objects were most excellent. They are stated in the first of a series of elaborate rules, which provided that the organization should be known as "The Phœnix Social and Literary Union," and have for its objects the mental and social advancement of its members; that it should be purely non-political, and be conducted by a committee and manager, who should have full control of all matters relating thereto.

This, as I said, was the first of a series of elaborate rules. It discloses a most laudable object, namely, the mental and social advancement of the members of the club, and makes the usual provision, which I may say is characteristic of all clubs, namely, that a committee and manager should have control of all matters relating to it. It is now alleged on behalf of the prosecuting authorities that what was originally contemplated, and did for some time exist, has been wholly changed; that the committee, which was an essential feature in the original constitution, has disappeared, and that the manager (the defendant O'Reilly) has become practically supreme. The magistrate tells us that in the year 1893, in order to requite the defendant O'Reilly for his services as manager, the committee recommended that for the next twelve months the profits arising from the membership fees, bar, billiards, and card rooms, should be given to the manager in lieu of his services, and money lent by him, on his agreeing to conduct the club on such lines and under such rules as the committee might from time to time determine. Whatever the

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recommendation originally contemplated may have been, the arrangement actually come to was reduced to a minute, and entered on the minute-book. Mr. John M'Dermott, who was president of the club, very candidly tells us how it came to be made. He said that after a time the defendant O'Reilly, who was manager, complained that the club was not supporting itself; that O'Reilly was continually grumbling, and in the end that his salary was increased from £1 to £1 5*s*. a week as manager. "We then," he added, "made the arrangement detailed in the minute of 1894 to satisfy him, and *get rid of a burthen ourselves.*" On cross-examination M'Dermott further stated "that Mr. O'Reilly, the defendant, wanted to give up the club, and had been growling because it was not paying. *He was asked to keep it on at his own risk.*" These were the circumstances under which the arrangement detailed in the minute of March, 1894, was entered into. The club was an insolvent concern, and O'Reilly, the manager, was asked to keep it on at his own risk.

The minute of the 6th March, 1894, runs thus:—"The annual meeting took place on above date, there being a large attendance of members, and, after the transaction of the usual business, the committee and members proceeded to the supper room, where the chair was taken by Mr. M'Dermott, and the vice-chair by the treasurer, Mr. M'Cabe. After toasting the prosperity of the club, a lengthy discussion followed as to its future control, and it was unanimously resolved that it be placed in the hands of the manager, conditional that he received the profits as remuneration for his services if he conformed to requirements of members, and paid all expenses incurred, rent, attendance, gas, etc."

This is the last entry in the minute-book. After this there is no recorded transaction of any business by the committee; there is a vague statement by O'Reilly that the members of the committee were in touch with him, and a curious statement that he accounted "by complaint to them." But a committee properly speaks by resolution, and there is not a single minute of any resolution after the one of March, 1894, by which the future control was handed over to O'Reilly—not a minute even as to the admission of members, which O'Reilly says largely depended on him. Indeed, one of the witnesses, Wm. Mee, a jeweller, gives a very graphic

description of the mode of his admission to membership. He said, "I had been there with a friend before I got a card. I did not pay any money for the card, but I did work. My assistants cleaned the clock, and put it in order. The charge in a shop would be about seven or eight shillings. The fair price would be four or five shillings. The clock was cleaned in or about September. O'Reilly bought it at a sale, and he asked me to repair it. I repaired it in an hour or two. He never asked me what I charged, but I told him the repairs were about four or five shillings. He gave me a club card (the badge of membership). I then said, we will cry quits now." Mee goes on to add, "I did not pay any money for the second card; I supplied a small diamond for 7*s*. to O'Reilly; I owed 2*s*.; I said that will be square, or something to that effect, and he gave me a bottle of beer and a cigar."

Now I do not attach any significance to the fact that only the small sum of five shillings was charged for admission to membership, because I do not at all see why the humbler classes of society should not have a club as well as the more opulent. Indeed, the objects of this so-called Phœnix Club were, as I have already stated, in its original conception most excellent, but I point to the evidence of Wm. Mee as indicating the uncontrolled authority exercised by the defendant, O'Reilly, even in that most delicate and sensitive of all matters, the admission of members. What then is the law on the subject? There are some matters that I pass by, viz. that this house had been for some time past under the observation of the police; that it was stated that its opening synchronised with the closing of the public-houses, and, that, when the police inspector went there on the last occasion, he found twenty-three people in all there, seventeen of whom were engaged in drinking, some actually drunk, and some the worse for drink. I pass all this by, and come to what I consider the legal test as to whether O'Reilly should have been licensed or not. This in my opinion depends upon the question whether the property in the exciseable articles in the establishment was in the members of the so-called club, or in the defendant O'Reilly. This is the test plainly adopted in the leading case of *Graff* v. *Evans* (1), the

(1) 8 Q. B. D. 383.

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authority of which has been recognized in all subsequent cases. It is in my opinion obvious, under the circumstances of the case, having regard to the evidence of M'Dermott, and to the language of the minute of March, 1894, and to the controlling action of the defendant O'Reilly since then, that the property in the exciseable articles was in O'Reilly exclusively. He therefore sold by retail exciseable articles without a licence, and has rendered himself liable to the penalties prescribed by law.

O'BRIEN and JOHNSON, JJ., concurred.

The order of the Court was as follows:—

"ON, &c. . . . the Court being of opinion (1) that there was no evidence of the existence at No. 84, Marlborough-street," [on the dates in question] "of any club in which the subscribers had a common property or interest in the exciseable articles supplied there; (2) that there was no evidence of any letting made or tenancy existing between the defendant as owner and any other person or body of persons as tenants of the premises or apartments; (3) that there was no evidence of the admission as members of the alleged club of the persons who were proved to have been supplied, as members, with intoxicating liquors on" [the dates in question], "it is considered and adjudged that the said Divisional Justice was not correct in point of law in his said determination, but should have convicted the defendant," &c. No costs.

Solicitor for the appellant: *M. Tobias.*
Solicitors for the respondent: *Ennis & Son.*

A. E. R. J.

REG. (O'MAHONY) *v.* ELLIS (1).

Q. B. Div. 1897.

Nov. 3, 5.

Poor Law—Outdoor relief—Relieving officer—Payments made without previous order—"Nature and duration of relief given"—Auditor—Surcharge—1 & 2 Vict. c. 56, ss. 94, 95—10 Vict. c. 31, ss. 27, 28—General Orders of the Local Government Board, 1853 and 1882.

An order of Poor Law Guardians giving outdoor relief must comply with the rules and regulations made pursuant to the Poor Law Acts, and, in particular, must state as well the duration as the nature of the relief given.

Where a valid order has not previously been given, payments by a relieving officer in outdoor relief (save provisional relief afforded in cases of sudden or urgent necessity) are unauthorised and illegal, and cannot be legally sanctioned by any subsequent order.

CERTIORARI. This was a motion to make absolute a conditional order to quash certain disallowances made by the defendant, an auditor acting under the Poor Law Acts, when auditing the accounts of the Fermoy Poor Law Union for the half-year ending the 29th September, 1896, whereby the defendant had surcharged Patrick O'Mahony, one of the guardians of the poor of said union, with payments amounting to the sum of £9 13*s.* 6*d.*, the grounds alleged being that such disallowances were made without, and in excess of, jurisdiction; that the sums surcharged were improperly disallowed and surcharged; and that the certificate of disallowance and surcharge was bad as not stating the cause for which such amount was disallowed.

The certificate or note of the surcharge in question was made in the "Application and Report Book," for one of the districts in the union, and was as follows:—

"To settle the questions as to whether the Guardians are to continue to sanction relief given in cash by the relieving officers (other than in cases of sudden and urgent necessity) I have disallowed the expenditure marked 'X.'

(1) Before SIR PETER O'BRIEN, L.C.J., PALLES, C.B., and O'BRIEN and JOHNSON, JJ.

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On the opposite page—"I hereby surcharge the following Guardians with the sums set opposite their respective names, and I certify the said several sums to be due by them respectively—Mr. A. Heskin, £4 17*s.* 6*d.*; Patrick O'Mahony, £9 13*s.* 6*d.*; John Magnier, £4 4*s.*; Col. C. Deane, 15*s.*

"Dated this 9th December, 1896.

"WILLIAM E. ELLIS, Auditor."

In the affidavits filed by the prosecutor, or in support of his case, it was stated that the system of outdoor relief, now questioned by the auditor's surcharges, had been in existence for over twenty years in this union; that no formal complaints on the ground of its irregularity had ever been made to the guardians, though it was admitted that the auditor had, on at least one occasion, made objections in regard thereto to officers of the guardians, who communicated the effect of the complaint, so far as they understood it, to the Board. Under this system, it was urged, no part of the relief given was given on the responsibility of the relieving officer; that in each case an order of the Board of Guardians authorising such relief was made previous to the first weekly payment; that, when a person became an applicant for relief, the relieving officer brought the circumstances before the guardians at the next meeting, and an order was then made for relief in cash—weekly sums, varying from 1*s.* 6*d.* to 3*s.*—as appeared from the Application and Report Book; and that, until such order, no payment was made by the relieving officer to any person; that subsequently, at each succeeding meeting, the relieving officer brought these cases forward, and if the parties (as was the case in the particular instances in question) continued to be in need of relief, such weekly payments were continued; while, where the circumstances of the recipients had altered for the better, the payments were ordered to be discontinued. In an affidavit, sworn by Colonel Deane, one of the guardians, it was stated that the practice was to make an order for a certain sum to be paid to a certain person for outdoor relief; that the relieving officer then gave the amount for a week, and at the following meeting, the guardians checked the outdoor relief list, and saw that the sum had been paid; they also considered whether the relief should be continued, and, if they were of opinion that the relief should be stopped,

they so ordered; and he added that this system insured that no person should get outdoor relief for one week without the guardians having satisfied themselves that the amount should be paid, whereas, if the guardians, in the first instance, specified a particular period, say three months, as the auditor's ruling seemed to require, the relief would be given for the whole of such period without regard to any change of circumstances.

The auditor, in an affidavit filed as cause, stated that—acting under the General Order of the 8th April, 1853, of the Poor Law Commissioners relating to Union accounts (Rule VII., clause 2) (1), made under the authority of 1 & 2 Vict. c. 56, s. 3—he had disallowed the items in question, as he "considered that the payments were not made by competent authority." He referred to Article 48, section 6, of the General Order of 18th December, 1882, regulating the meetings and proceedings of Boards of Guardians, made under the authority of the same section of the Poor Law Act of 1838, which prescribed, as one of the duties of the relieving officer, "to relieve all poor persons within his district, as directed by the Board of Guardians, and authorised by the signature and initials of the chairman of the meeting, in the columns provided for that purpose in the prescribed form, entitled the Application and Report Book" (2). He submitted that, except in the particular class of cases—of "provisional relief" to be afforded "in cases of sudden and urgent necessity" (3)—the relieving officers had no power to give outdoor relief without authority so previously obtained from the guardians; and that, in deciding whether any particular payment of outdoor relief was made "by competent authority," he could not admit statements of interested parties to supplement or vary the entries in that book. He pointed out that admittedly only one order was made in the case of each person relieved, that is, when the name was first put upon the list, and that the orders subsequently entered from week to week were admittedly retrospective sanctions of relief given by the relieving officer in anticipation of such sanctions, and on his own responsibility. He stated that he had called atten-

(1) Mooney's Compendium of the Irish Poor Law, p. 321. (2) *Ibid.* 275.

(3) 10 Vict. c. 31, s. 7; General Order of 18th December, 1882, Article 48, section 4 (Mooney, p. 275).

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tion on several occasions to the irregularities of the practice in this respect, but that the practice continued nevertheless, and that its direct result was that nearly all the recipients of outdoor relief continued uninterruptedly upon the list for several years, and that the annual expenditure in this union in outdoor relief had gradually increased since 1881 and 1882, from £311 to nearly £1700, while in adjoining unions substantial reductions in like expenditure had been made in recent years. He submitted that, as the disallowance in question was made under 10 Vict. c. 31, it was not subject to the provision regulating audits of townships and borough accounts (under 34 & 35 Vict. c. 109, s. 12), requiring the reasons for the disallowance to be stated by the auditor; but that, in any event, the guardians, both directly, and in correspondence through the Local Government Board, were in full possession of his reasons for the surcharges questioned.

"The Application and Report Book" of the union, which was referred to and produced in Court, was in the form, with columns, prescribed in the Schedule (Form No. 20), to the General Order ("The Accounts Order") of the 8th April, 1853. [See the form, given in Mooney's Compendium of the Irish Poor Law, p. 342.] In the instances before the Court, putting aside the other columns descriptive of the applicant and his circumstances, which were not in all cases filled in, and taking merely the column headed "*Decision and order of the Board of Guardians on the application*," and the sub-column, headed "*otherwise relieved*" (*i. e.*, than by admission to the house)—the entries were of this type,—

Name.		If Otherwise Relieved.			If Application Refused, Date of Refusal.	Initials of Chairman authorizing such Relief or Refusal.
		Nature and Duration of Relief Ordered.	Date of the Order.	Money Value of Relief.		
			1896.			
X Y	Relief ordered at 2*s.* 6*d.* per week, from this date, 9 May, '96, *C D*	Cash, one week,	16 May,	2*s.* 6*d.*		*A B*
		,,	23 May,	2*s.* 6*d.*		*C D*
		,,	30 May,	2*s.* 6*d.*		*A B*

The original order for relief was written in one of the columns

to the left, and initialled by the chairman presiding at the meeting; and the entries, such as "16 May, cash, one week, 2*s.* 6*d.*, A B," had reference to the payments made by the relieving officer for the week ending on the date mentioned. The initials were in most cases in the wrong column.]

George Green, for the applicant.

Matthew J. Bourke, Q. C., and *Cullinan*, for the auditor (1).

The only point argued was the legality of the practice.

During the argument reference was made to the following Rules of the Local Government Board, regulating the duties of guardians and of their relieving officers in regard to outdoor relief:—General Order of 18th December, 1882, Article 14, clauses 4 and 6 [Mooney, p. 262]; Article 48, clauses 3, 4, and 6 [Mooney, pp. 274, 275]; General Order of 8th April, 1853, Rule 3, "Accounts to be kept by the relieving officer" [Mooney, p. 318]; and the Schedule Form, No. 20, to that order, and the rules and instructions subjoined to that Form [Mooney, p. 342].

Counsel also referred to the following provisions regulating the powers and duties of the auditor:—1 & 2 Vict. c. 56, ss. 94, 95; 10 Vict. c. 31, ss. 27 & 28; and General Order of 8th April, 1853, Rule 7, clause 2 [Mooney, p. 321].

Cur. adv. vult.

Nov. 5.

SIR P. O'BRIEN, L. C. J.:—

The practice in relation to the administration of Poor Law relief which has been impugned by the auditor, Mr. Ellis, in this case, and which is sought to be sustained by the applicant, is stated to have prevailed in the Fermoy Union for over twenty years.

Mr. Ellis has challenged it as wholly unauthorised by the Poor Law Relief Acts or the regulations made pursuant to their authority. He alleges that the direct result of the practice is that nearly all the recipients of outdoor relief in this union have continued uninterruptedly on the list for several years, and that the annual expenditure in outdoor relief has gradually increased since 1881–1882, from £311 to £1700; while in the adjoining unions substantial reductions in like expenditure have been made in

(1) *Mr. George Wright, Q.C.*, appeared for the Guardians, but was not heard.

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recent years. This certainly is a very startling result. The auditor alleges that it has been the practice of the guardians for many years past to sanction relief (other than the provisional relief afforded in cases of sudden and urgent necessity), given in cash by the relieving officers on their own responsibility.

We are of opinion that this practice, inasmuch as there was no antecedent direction limiting the duration of the relief ordered, did in effect prevail; that it is wholly illegal, authorized neither by statute nor by regulation.

On the part of the prosecutor who applies for a writ of *certiorari* to quash the surcharge, it is suggested that there was an antecedent valid legal direction given in each particular case; that, for instance, when a direction was given to pay an applicant, say 2*s.* 6*d.* per week, this sanctioned a payment each week until an order to stop the payment was made. This may have been the view of the guardians, but it was precisely what they could not legally do. No indefinite order of the kind has any legal sanction.

By the 10 Vict. c. 31, sect. 3, it was enacted that the Poor Law Commissioners from time to time as they should see fit should regulate and determine the manner of application for all relief to be given under the provisions of the Act, and the manner of granting, ordering, and giving such relief, and keeping the accounts thereof; and it was provided in the same section that the guardians of the union and their officers "shall administer such relief subject to the rules and regulations so to be made by the Commissioners."

There cannot be any doubt as to the mandatory character of the rules and regulations made pursuant to these provisions. The words of the statute are "*shall administer such relief subject to the rules and regulations, &c.*" The rule applicable to the present case is to be found in Article 14 of the General Order of 1882, which commences thus:—"At every ordinary meeting of the guardians, the business . . . shall be conducted in the following order":— and then (in the 6th clause) provides that the guardians shall "consider all applications for relief, and the particulars recorded in regard to each case in the Application and Report Book of each relieving officer, and shall decide whether any and if so what relief or further relief should be granted in each particular case in

pursuance of the laws for the relief of the poor; and the decision of the Board shall be forthwith recorded in the said books, to be authorized by the signature or initials of the presiding chairman in the columns respectively provided for that purpose." The provision in regard to keeping these books is contained in Article III. of the General Order of 1853, which provides that "every relieving officer shall enter up and accurately keep, according to the forms and directions given in this order and in the schedule hereunto annexed," the books of account therein mentioned, amongst others, "the Application and Report Book" (Form 20), "in which shall be entered the names and description of the several applicants for relief, the amount, nature, and cost of relief given, and other particulars, according to the form and instructions in the said schedule numbered 20."

In the Schedule Form there is a separate column for "the nature and duration of relief ordered." It is therefore quite plain that the decision of the guardians as to the relief to be given —which is to be recorded in the Application and Report Book, which is to be in accordance with the prescribed form—should state the nature and *duration* of the relief. But this is the very thing the guardians of the Fermoy Union have not done, because it cannot be for a moment contended that the orders which are impugned by the auditor, viz. "2*s*. 6*d*. per week," were made according to the form given in the schedule. The duration of the relief should be distinctly prescribed; and, as this was not done, we think the objection raised by the auditor well founded.

It is said, however, that the matter was brought weekly before the Board, and that the weekly payments were then investigated and checked. This is not a compliance with the regulations. There should, in each case of relief, be a clear antecedent direction, defining the nature and duration of the relief to be administered. We think that Mr. Ellis was entirely right in his disallowance. The guardian surcharged had sanctioned an illegal payment, and was therefore liable to be surcharged. The auditor states that he has been complaining of the action of the guardians for several years past. It is to be regretted that his advice and remonstrance did not meet with the deference they merited.

Mr. Ellis appears to be right in every respect and must have his costs.

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PALLES, C. B.:—

My view of this case can be expressed in a few sentences. The only authority of the guardians in relation to outdoor relief is to administer it according to the directions of the Local Government Board. That Board has directed, that (with certain exceptions not material here, viz. in cases of sudden and urgent necessity) it shall not be administered without the previous order of the guardians. The Board has further directed that orders for this purpose shall be in writing, and recorded in a certain book, and shall state—by making entries in a schedule—*inter alia*, the "nature and duration of the relief," that is, the period for which the relief is to continue.

This is not a matter of mere form; it is part of the policy of the Rules that orders of this nature shall not be indefinite, and that, at the time when each order is made, the intellects of the guardians shall be directed to the time for which the relief is to continue, as well as to its amount and nature. It follows that any order directing outdoor relief which does not state its duration is either wholly void, or (and this is the interpretation of it that I prefer) must be deemed to direct relief until the next meeting.

In the present case, the payments disallowed were payments for outdoor relief for which previous orders had not been made by the guardians. They were therefore illegal, and properly disallowed.

As to the long usage relied upon, that cannot help the applicant here. One of the purposes for which auditors exist is to prevent the continuance of illegal usages.

The case has been brought before us by the auditor with great precision and knowledge of legal principles, and the only matter to be regretted is that he did not disallow (as it appears to me he ought to have disallowed) similar payments when his attention was first directed to them. It does not, however, lie in the applicant's mouth to complain that he was treated, as I am of opinion he was, with too much leniency.

In my opinion, the conditional order should be discharged with costs.

O'BRIEN, and JOHNSON, JJ., concurred.

Solicitor for the applicant: *Rice.*

Solicitor for the auditor: *Carroll.*

A. R. R. J.

HARVEY *v.* HARKIN (1).

(1896. No. 2266.)

Q. B. Div.
1896.
April 25, 27.

Defence Acts, 1842 *to* 1873—*Lands Clauses Consolidation Act*, 1845—*Lands compulsorily taken for defence of the realm—Notice to treat, offering gross sum for absolute purchase of lands taken by Secretary for War—Ejectment for non-payment of rent against a tenant from year to year (portion of whose holding had been so compulsorily taken) and all persons concerned—Possession of the Crown—Stay of proceedings as against the Secretary for War—Landlord and Tenant (Ireland) Act*, 1860—*Land Law (Ireland) Act*, 1881, *ss.* 1, 2, 5.

The Secretary of State for War, requiring certain lands for defence purposes, caused the lands to be surveyed, and served, in November, 1894, a notice under the Defence Acts and Lands Clauses Acts, offering to the plaintiff (the owner in fee) and his tenants a gross sum for the absolute purchase of the lands required. He subsequently, under warrant of Justices, was put into possession of said lands, which included a small portion of the holding of the defendant Harkin, a statutory tenant from year to year of the plaintiff. The Secretary of State for War had obtained from Harkin a conveyance of his interest in the portion of his holding so taken, but the compensation for the plaintiff's interest in the lands taken had not been ascertained by a valid arbitration. The plaintiff now brought an action against Harkin "and all parties concerned" for recovery of possession of Harkin's holding for non-payment of rent. The writ having been served on the Secretary for War, this motion was instituted on his behalf, that all proceedings in the action as against him should be stayed:—

Held, that the offer in the notice of November, 1894, of a gross sum in respect of the absolute purchase of all interests was a sufficient compliance with the statutes; that in any event the Secretary for War was lawfully in possession of portion of the land as trustee for the Crown; and that, inasmuch as ejectment for non-payment of rent does not lie against the Crown, all proceedings in the action should be stayed as against its representative.

MOTION on behalf of Her Majesty's Principal Secretary of State for the War Department for an order that all proceedings in the action be stayed against him, on the ground that the action

(1) Before O'BRIEN, HOLMES, and GIBSON, JJ.

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was misconceived as against said Principal Secretary, and that as against him no relief could be obtained therein, and that the action was an abuse of the process of the Court.

The action was one of ejectment for non-payment of rent, brought by the plaintiff, a landowner in the county Donegal, against a judicial tenant from year to year of his, named John Harkin, the writ naming as defendants "John Harkin and all persons concerned." Eight and a-half years' rent was alleged to be due, the yearly fair rent being £4 10*s*. The writ was served on the Secretary of State for War, as well as on Harkin, under the following circumstances. Certain lands having been required by the Principal Secretary under the Defence Acts, 1842 to 1873, for the purpose of intended defence works at Dunree Hill, these lands were surveyed, &c.; and, on the 14th of November, 1894, a notice in the usual form (1) was served on the plaintiff and all parties interested, offering a gross sum of £920 4*s*. 7*d*. to the plaintiff and his tenants, "as the consideration for the absolute purchase of" the parcel of lands so required, of which parcel a portion of the defendant Harkin's holding formed part. On the 15th of June, 1895, the Principal Secretary, having obtained a warrant under section 19 of the Defence Act, 1842, was put into possession of the lands required by him. An arbitrator (Mr. Murphy) was then appointed under the Railways (Ireland) Act of 1851. He held an inquiry, but, pending the appeal in *Reg.* (*Moore*) v. *Abbott* (2), refrained from making his final award. Mr. W. G. Towers, solicitor, on behalf of the Principal Secretary, attended at this inquiry, and there learned that arrears of rent were then due by Harkin and the other tenants, but having previously agreed with Harkin as to the compensation to be given to him in respect of his interest in the portion of his holding so taken, this amount was paid to Harkin on the 15th of June, 1895, after the inquiry before Mr. Murphy, and a conveyance executed by Harkin. Only a small portion of Harkin's holding was taken, the abatement of rent apportioned and allowed by Mr. Murphy in

(1) A printed form similar to that in *Reg.* (*Moore*) v. *Abbott*, [1897] 2 I. R. at page 364.

(2) Since reported—[1897] 2 I. R. 362.

respect thereof being only 12*s*. An affidavit was filed by the plaintiff's solicitor, stating that, before Mr. Murphy, on the 14th of June, 1895, he had called attention to the fact of arrears being due by Harkin and others of the tenants, and had asked that some provision should be made for their discharge, but that the solicitor for the Principal Secretary had objected, and contended that Mr. Murphy had no jurisdiction to have regard to such arrears in making his award, and that Mr. Murphy had so held.

J. F. V. Fitzgerald, for the applicant:—

The notice of the 14th of November, 1894, is in the form in use since 1860; it fulfils the statutory requirements:—the Defence Act, 1842, sects. 16, 19; the Lands Clauses Consolidation Act, 1845, sect. 6; and the Defence Act, 1860, sect. 7—see *Ex parte Laws* (1).

But even if there were an error of procedure as regards the notice, this would be immaterial. The Secretary of State was put into possession under the Justices' warrant—the Defence Act, 1842, sect. 19—and is lawfully in possession on behalf of and as trustee for the sovereign. The cases in which it has been held, or sought to be held, that an officer of the Crown was personally responsible as having acted without authority or contrary to orders are cases of tort: *Hawley* v. *Steele* (2); *Tobin* v. *The Queen* (3). This is an action that assumes a contract of tenancy; and the plaintiff's only remedy, if any, so far as the Crown and its servants are concerned, is by Petition of Right. Ejectment never lay against the Crown: *Templemore* v. *Principal Officers of Her Majesty's Ordnance Survey* (4); *Doe* d. *Legh* v. *Roe* (5); and Deasy's Act (23 & 24 Vict.), which now regulates ejectment for non-payment of rent, does not apply to or affect the Crown. Having served the Secretary of State with the writ in this action, the plaintiff cannot, in any event, treat him as a trespasser. Whether as assignee of the tenant's interest in the lands taken, under the conveyance referred to in the affidavit, or (apart therefrom) as in possession under the

(1) 1 Exch. 441.
(2) 6 Ch. D. 521.
(3) 16 C. B. (N. S.) 310.
(4) L. R. (N. S.) 73 (1833).
(5) 8 M. & W. 579.

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Justices' warrant, his possession is lawful and regular, and cannot be affected in any way by this action, which, therefore, as against him, should be stayed: *Doe* d. *Legh* v. *Roe* (1).

Crookshank, for the plaintiff:—

The notice of November, 1894, is invalid; it does not contain any offer in respect of the landowner's interest in the reversion. The intention of the statutory provisions in this matter was that the offer should distinguish between the different estates in the lands acquired so as to allow the different parties interested an option to accept or refuse, which they cannot have if a sum in gross be mentioned merely. [On this point counsel referred to *Lister* v. *Lobley* (2), and *Re Laws* (3)].

If this be so, we submit that the Justices' warrant is likewise bad, and that the Secretary for War is not lawfully in possession: *Armstrong* v. *Waterford and Limerick Railway Co.* (4). He cannot, therefore, shelter himself behind the immunity of the Crown, but becomes responsible as an individual: *Tobin* v. *The Queen* (5); *Kirk* v. *The Queen* (6). He must here be treated either (*a*) as a mere trespasser, or (*b*) as assignee of the tenant's interest under a conveyance (not produced). Such an assignment, however, is void; for the landlord has not received notice, or been given an opportunity to exercise his right of pre-emption under section 1 of the Land Law (Ireland) Act, 1881; and this is a sub-division of the tenancy contrary to sects. 2 and 5 of the same Act: *Fogarty* v. *Shanahan* (7). If not assignee, but a trespasser merely, he has no right to intervene in the proceedings. The effect of the action of the Secretary for War, in taking a conveyance from the tenant with knowledge of the fact that an arrear of rent was due to the plaintiff, but without making provision therefor (to which on a sale the landlord would be entitled—Land Law Act, 1881, s. 1), and in instituting this present motion, is to deprive the plaintiff of all remedy for the arrears of rent due out of the lands taken.

(1) 8 M. & W. 579.
(2) 7 A. & E. 124.
(3) 1 Exch. 441.
(4) 10 Ir. Eq. R. 60
(5) 16 C. B. (N. S.) 310.
(6) L. R. 14 Eq. 558.
(7) [1896] 2 Ir. R. 273, 286.

J. F. V. Fitzgerald, in reply:—

During the argument counsel also referred to *Slipper* v. *Tottenham, &c., Railway Co.* (1); *Reg.* (*Moore*) v. *Abbott* (2), and HOLMES, J., to *M'Sheffry* v. *Doherty* (3)].

Cur. adv. vult.

April 27.

O'BRIEN, J.:—

In this case a motion has been made to the Court on behalf of the Secretary of State for the War Department to restrain the proceeding in the action, which is one of ejectment for non-payment of rent, so far as it concerns or affects him, upon grounds which have been so repeatedly acted on both in this country and in England, that it is not necessary to refer to them now at any length, namely, that the defendant in truth and reality represents the Crown, and that the Crown, being the fountain from which all law and legal authority proceeds, cannot be sued as an ordinary litigant in the Courts. The action is to recover possession of certain lands in county Donegal for non-payment of rent, an arrear of nearly nine years being stated to be now outstanding, and the intention and meaning of the action is admittedly to squeeze from the Secretary of State for War, or from the purchase-money which is to be paid by him in respect of the tenant's interest in these lands, which are being compulsorily acquired for the defence of the realm, the amount of this arrear so long due. The plaintiff in the action is the owner in fee of these lands, and the defendant is an ordinary agricultural tenant of a holding on which a fair rent has been fixed. The Secretary of State for the War Department has been served with the writ of summons in the action, and in this way became, under the provisions of the Common Law Procedure Act, and the rules now corresponding to those provisions, a party to the action to all intents and purposes. It is no part of the argument of the applicant that he is sued in his personal capacity; and, in any event, it must, I think, be taken that he was served in his representative capacity, as the Secretary of State for the War Department, and acting on behalf of the Crown.

(1) L. R. 14 Eq. 112. (2) [1897] 2 Ir. R. 362. (3) *Ibid.* 191, 210.

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The grounds for resisting the motion appear to be shortly these, that a certain condition is required by law to be complied with before the Secretary of State for the War Department could take these lands under the compulsory powers conferred on him, namely, that an application should be made to the owner, not simply to treat for the purchase of his estate, for the provisions of the Defence Act of 1842 differ in this from those of the Lands Clauses Acts, but in the form of an offer of a sum of money for the absolute purchase of the lands; and that this provision has not been complied with. The argument rests upon the fact that, in the notice served upon the owner and occupying tenants of these lands, the offer made is of a sum of money in gross, not distributed among the various parties according to their interests in the lands, so that the owner, it is alleged, could not form any opinion what the amount of the offer for his interest might be, or consider whether he should accept the offer or not. For this reason Mr. Crookshank, on the plaintiff's behalf, contends that there was no sufficient compliance with the statutory provision.

It is no doubt difficult to give any reasonable or consistent construction to the Defence Act of 1842, which preceded the more elaborate provisions of the Lands Clauses Acts and the subsequent Acts, which were passed when more attention had been directed to the difficulties incident to the compulsory acquisition of land by public authority, or for purposes of a more or less public nature. The Act of 1842 deals in its 19th section with the offer which the Secretary for War should make. It is not indeed directly stated in any substantive clause that an offer must be made of the purchase-money which it is proposed to give for the lands to be taken; but the section, in giving to the Secretary of State the right to take possession of the lands, refers to such an offer. It says:—"That, in case any such bodies or other persons hereby authorized to contract on behalf of themselves or others as aforesaid, or any other person or persons interested in any such lands, buildings, or other hereditaments, which shall be so marked out and surveyed as aforesaid, shall, for the space of fourteen days next after notice in writing subscribed by or on behalf of the said principal officers," who are now represented by the Secretary of State for the War Department, "shall have been given to the

chief officer or officers of any such body, or to such other persons hereby authorised to contract on behalf of others, or interested themselves, as aforesaid, or left at his, her, or their usual place of abode, *refuse or decline to treat or agree*, or by reason of absence shall be prevented from treating or agreeing with the said principal officers, or *shall refuse to accept such sum of money as shall be offered by the said principal officers* as the consideration for the absolute purchase of such lands, buildings, or other hereditaments, or such annual rent or sum as shall be offered for the hire thereof, either for a time certain, or for such period as the exigence of the public service may require, then and in such case it shall be lawful, etc." The section then goes on to provide that the said principal officers (whose place for the purposes of these Acts the Secretary of State for War now fills) may require two or more Justices of the Peace, or certain other persons specified, to issue their warrant, and to put the said principal officers in possession of the lands, and afterwards to summon a jury "to find the compensation to be paid either for the absolute purchase of such lands, buildings, or other hereditaments, or for the possession or use thereof as the case may be."

On the construction of this section, it was contended by Mr. Fitzgerald, on behalf of the Secretary of State, that "absolute purchase," here meant the aggregate of all the successive or concurrent interests in the land proposed to be taken. However, I remember that, on the former discussion of this Act of Parliament (in *Reg.* (*Moore*) v. *Abbott* (1)), this was not considered to be the meaning of these words, and the view which was then taken was, that the words "absolute purchase," in this 19th section, were used and stood in opposition to hire or temporary letting of the lands, and thus no argument can be drawn from the words as including all the various interests connected therewith.

Mr. Crookshank contended, on the authority of a case in 7 Adolphus and Ellis, that the offer here intended was one for the absolute purchase of the interest in the lands of the person to whom the offer was made. The words "owners or proprietors" in the Turnpike Act on which the case to which I have referred—

(1) [1897] 2 I. R. 362.

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Lister v. *Lobley* (1)—was decided, might well be used to designate, not only owners in fee, but also persons having temporary, or partial, or leasehold, interests in the lands, and, undoubtedly could not be confined to persons having the entire interest in their hands. But, whether "owners or proprietors" may or may not admit of this construction, is not here the question, but what was meant in this particular Statute. It is undoubtedly difficult to arrive at any reasonable interpretation of this section of the Act, for it may be that the owner of a partial interest, such as a tenant for years, may differ in his view from the owner in fee, and, if one person disagreed, there could be no acceptance of the offer; and this is certainly in favour of Mr. Fitzgerald's argument. On the other hand it is a strong thing to confer on one person the absolute right of determining on the sufficiency of the purchase money offered. One of the earlier sections of the Act (section 10), is conversant with the description of the class of persons who, without the concurrence of the other parties interested, may contract for the absolute sale of the lands proposed to be acquired. One of these is a tenant for life; another is a tenant in tail; and the section expressly mentions reversionary interests which correspond to the interest of Harvey in the lands which are the subject of the present ejectment proceedings.

If the plaintiff fills the character of a person who may receive and accept the proposal to purchase, as it appears to me he does, it was unnecessary, apparently, to specify any other person or interest in the lands. He could have agreed to accept the sum offered, and could have given a sufficient conveyance to the Secretary of State; and being one of the class of persons who might, without any consent on the part of other interested parties, have accepted the offer, and the necessity, as it would thus appear, for serving any other party with notice being thus dispensed with, he has taken on himself, without showing what the other interests are, simply to decline and refuse to treat for the sale of the lands, and has come here to resist the present application on the alleged ground that the condition of the statute was not complied with. So far as I can see he could have agreed to accept the sum offered, and could have left to the proper tribunal the consideration of how that sum

(1) 7 A. & E. 124.

should be apportioned. The difficulty might then, no doubt, arise as to the procedure which should in that case be followed, so as to determine the value of the interests of the persons in occupation, which may happen to be far more substantial than that of the owner in fee.

From a consideration of the Statute, it thus appears to me that it is not requisite to do more than to offer one sum for the purchase of the lands, and that there is no provision for the different interests which may be involved, or mode of apportionment of the purchase money between them until the matter came before a jury. Upon the whole, though it is extremely difficult to put a reasonable construction on the Act, I have come to the conclusion that the Secretary of State for War has satisfied the necessary condition by offering one sum of money in this notice without further specifying the particular interests in respect of which it is to be paid. That condition being fulfilled, the Secretary of State had the right to call on the persons mentioned in the section to put him into possession of the lands.

Mr. Crookshank, who contends that he is a trespasser by reason of his alleged non-compliance with that condition, finds himself in this extraordinary difficulty that he has himself made him a defendant in an action of ejectment for non-payment of rent, a position which is utterly inconsistent with the allegation that he is a trespasser; and, by reason of the conveyance, as well as by reason of the position thus taken up by the plaintiff, the Secretary of State is in a certain way the representative of the tenant's interest, and I do not see how possibly he can be considered a trespasser.

Mr. Crookshank relied on the Defence Act, 1860 (23 & 24 Vict. c. 112), which by section 46 purports to amend the Defence Act of 1842, by incorporating the provisions of the later Act in regard to the compensation for lands taken otherwise than by agreement; but, when you look at the Act of 1860, it refers back to the machinery under the Defence Act of 1842, and really effects no change whatever save in relation to the service of notices. The Act of 1860, by section 29, gives the Secretary of State powers for the purposes of that Act, to put in force the machinery of the Lands Clauses Act, 1845; but these powers must, as Mr. Justice Gibson observed during the argument, in any event,

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relate to matters subsequent to the taking of possession under the Act of 1842.

Assuming that the possession of the Secretary of State is rightful, what is the result if this action is allowed to proceed? Judgment may be given, and execution issued, putting him out of possession; and thus a possession that is lawful and is not defeasible by any known form of ejectment, is to be put an end to. I was in doubt, at first, whether the Secretary of State could make use of his position to stay the proceedings at this stage; but I have come to the conclusion that he is equally entitled to use the position he occupies in the way he now is doing as to rely on it by way of defence. It is inconsistent with the idea that he is properly before the Court in these proceedings, if he is not at liberty to make his defence on a motion to stay the action, and the course which he has adopted is in my opinion the correct one.

The cases to which we have been referred do not, I think, assist us much in the matter. The leading case on petition of right and the liability of officers of the Crown is that of *Tobin* v. *The Queen* (1), in which we have the advantage of the argument of Lord Cairns and the judgment of Chief Justice Erle. In that case the proceeding was by petition of right, not by action, and the position there taken up, by counsel for the Crown in the argument, and in the judgment, was that no petition of right would lie where the action of the officer was wrongful and done therefore without the command of Her Majesty. The commander of an English man-of-war, named Douglas, had seized a vessel belonging to a firm of English merchants carrying on trade on the west coast of Africa, on the ground that the vessel was engaged in the slave trade, and, not being able to carry her away, burnt her. The owner having instituted proceedings by petition of right, the case made was, that the proceedings were wrong, that the course which should have been adopted was not petition of right but an action against the individual for his wrongful act. And the decision was on this ground, that there should have been an action against the officer

(1) 16 C. B. (N. S.) 310.

who was acting, not in obedience to a command of Her Majesty, but in the supposed performance of a duty imposed on him by Act of Parliament, for the suppression of the slave trade. It was admitted that the vessel in question was not equipped for, or engaged in the slave trade, and had no slaves on board. It thus followed that his act was wrongful. The decision was based on three grounds—first, that no petition of right lay where the act was without authority, where the person acted not under the direct command of the Queen but under a Statute, which, according to the view put forward by Mr. Crookshank, is the case here where the Secretary of State has taken certain lands under the Defence Acts. Another of the grounds was that petition of right does not lie for unliquidated damages for a trespass; and the third, that there was no command of the Queen to the officer to act as he did, and that therefore he could not allege the authority of Her Majesty *propria manu*. It would appear to have been assumed in that case, though not decided, that where a petition of right would not lie, no action would lie. In the present case, in any event, the Secretary of State could not be made answerable for the alleged wrong, for this is not an action for damages against a person alleged to be acting illegally outside the authority vested in him by the Crown; it is an action for the recovery of land, so that in this particular instance that kind of alternative remedy does not exist. The Secretary of State is in possession of the land, and if the action proceeded he would in all probability be put out of possession.

In regard to the plaintiff's contention that the Secretary of State is a trespasser on these lands, there is another matter to which our attention has been drawn, namely, that the course taken by the plaintiff assumes that he is in possession as in some way representing the tenant and not as a trespasser at all. How the Secretary of State came to take a conveyance from the occupier I cannot very well understand, though, of course, the occupier represented the interest in possession which was what the War Office wanted.

I do not take on myself now to determine whether the tenant, without infringing the rights of the owner of the fee-simple, could make such a conveyance as that which has been mentioned to us in the argument, and it is possible that some right might exist on the

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part of the latter to take advantage of this act; but, in my opinion, the main ground of Mr. Crookshank's argument, that the possession of the Secretary of State was illegal, is not available to him. There was a lawful possession on the part of the Secretary of State, whether under the Act of Parliament or this conveyance, and the motion should therefore be granted.

HOLMES, J.:—

There is I think no doubt that the Secretary of State for War, by virtue of the statutes that authorise him to acquire such land as is needed for the defence and security of the realm, may take an assignment of a leasehold interest, subject to a rent, without acquiring the reversion expectant on the lease. If under such circumstances the rent is not paid, the lessor might no doubt recover the amount due by a petition of right; but I am of opinion that he would have no other remedy. To decide otherwise would be contrary to the first principles of our law. The Secretary of State holds the lands vested in him, under the statutes to which I have referred, not in his individual capacity, nor even in the capacity of a Minister of State, but as trustee for Her Majesty and her successors; and an action brought against him would be in reality an action against the Sovereign. This applies as fully to an ejectment for non-payment of rent as to any other form of action. In such a proceeding, he would be a necessary defendant, and the effect of judgment and execution would be not only to deprive the Queen of possession but to destroy the lease of which she was the owner. It is the invariable practice of our Court to stay a suit against the Sovereign or her trustee at the earliest moment, and it is admitted that there would be no answer to the present application, if the conveyance made by the tenant of the statutory term has had the effect of vesting in the Secretary of State his interest under the tenancy in a portion of the premises.

Mr. Crookshank has argued that, as the sale by the tenant has not been made in accordance with the provisions of the 1st sect. of the Land Law (Ireland) Act, 1881, the assignment by which it has been carried out is void; but it is now well settled that, notwithstanding these provisions, a conveyance by a tenant from year to

year, that would have been good at common law, is still valid and effectual unless or until it has been set aside by a competent tribunal. It is further argued that as the assignment has been made without the written consent of the landlord, and as it has had the effect of sub-dividing the holding, it is illegal, either under the second section of the Act of 1881, or as being a breach of one of the statutory conditions. This would no doubt be so were it not for the compulsory powers of purchase which the Legislature has conferred on the Secretary of State. He is authorised to take either the whole or a portion of the holding, and, if the tenant had declined to come to an agreement with him, the premises required could have been taken against his will.

Under such circumstances, I am of opinion that the tenant is at liberty to do voluntarily what he could have been compelled to do under the machinery provided by the statute, and that it is immaterial whether the notice prescribed by the 19th section of the Act of 1842 was served or not. For these reasons I am of opinion that the Secretary of State is entitled to the order applied for, namely, that this action be stayed as against him. I may add that if it were necessary to decide it, I have no doubt that the notice served was in proper form, and that the warrant of possession was perfectly valid. I do not, however, rest my judgment upon the possession taken under the warrant. I decide upon the ground that the Secretary of State is not merely in legal possession, but that a portion of the lands held under the statutory term is now vested in him and that he is a necessary defendant to this action.

The order which the Court now makes will probably—indeed almost certainly, having regard to the decision in *M'Sheffry* v. *Doherty* (1)—have the effect of putting an end to the action altogether; but it is the only possible order, if I am right in the view I have taken of the assignment made by the tenant. Had there been no such assignment, and had the right of the Secretary of State depended only on possession under the warrant, I should have been disposed to limit the action of the Court to setting aside the service on the military authorities, who in that case would not

(1) [1897] 2 I. R. 191, 210.

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have been necessary parties to the action, and to preventing their possession being interfered with by the writ of execution. An order in this form would possibly be less injurious to the plaintiff than that which upon the assumption of the validity of the assignment the Court is bound to make.

GIBSON, J.:—

The tenant's interest in the part taken having been conveyed to the Secretary of State under the compulsory powers of the statute, it follows as a necessary consequence that, if Deasy's Act does not apply to the Crown, as is admitted, the only remedy is petition of right, and the motion to stay must be granted. I appreciate the inconvenience of this, especially if it prevents the continuance of the action against the tenant. The prohibition in section 2 of the Act of 1881 against subdivision of a holding does not apply to a sale under the Defence Act; and even if the notice was irregular, the tenant was at liberty to waive it. The conveyance was valid, and the Secretary of State, if a private person, would be a necessary party to any proceeding to destroy the tenancy in the holding.

Until the landlord's expropriation is complete, he is entitled to rent; and, until the tenant's expropriation is complete, he is liable to rent: *Callow* v. *Flynn* (1). Possibly as between the landlord and tenant, if there had been no conveyance the action could have been carried to judgment. But whether such judgment could have been enforced by turning the Crown out of possession is a different matter. The representative of the Crown was in lawful possession under the warrant pending completion, and was served with the writ. I think he was at liberty, at once and before conveyance, to obtain an order preventing the process of the Court from being used to dispossess the Crown.

Even if the notice under the Act of 1842 was modified by the Act of 1860, and ought, as argued, to have specified the compensation offered for the distinct interests separately—a matter which I do not decide—I am of opinion that the Court cannot treat the notice as a nullity or the entry under the warrant as illegal. The

(1) 26 L. R. Ir. 179.

tenant makes no such objection. The possession by the Crown in intended execution of the statute was lawful, and the officer obtaining it cannot be regarded as a trespasser personally liable for a wrongful act.

Solicitor for the Secretary for War: *Sir P. Coll.*
Solicitors for the plaintiff: *Crookshank & Leech.*

A. E. R. J.

IN THE GOODS OF JOHN M'DONAGH (1).

Administration—Grant to administrator of widow who had not taken out administration—Intestates' Estates Act, 1890 (53 & 54 *Vict. c.* 29), *s.* 1—*Probate Act* (*Ireland*), 1857 (20 & 21 *Vict. c.* 79), *s.* 78.

A widow died without taking out administration to her husband's estate, of which she had taken possession, he having died intestate and without issue. The widow by her will disposed of all her property (including her husband's assets), but appointed no executor. His assets were of small amount, but there was a possibility that they might prove to be of greater value than £500.

Under the circumstances of the case the Court granted administration of the personal estate of the husband to the administratrix of the widow, under the provisions of section 78 of the Probate Act of 1857.

JOHN M'DONAGH died on 25th September, 1892, intestate, and without issue, leaving his widow, Catharine M'Donagh, and one sister surviving him. The widow entered into possession of the farm and chattels of the deceased. She died on 20th February, 1897, without having taken out administration. By her will, dated 12th February, 1897, she purported to dispose of all her property, including the assets of her deceased husband. She appointed no executor to her will, and letters of administration, with the will annexed, of her personal estate and effects, were granted on 29th June, 1897, to her sister Honoria Conlon. Honoria Conlon now applied to the Court for liberty to apply for a grant of administration of the goods of John M'Donagh (without

(1) Before ANDREWS, J.

Q. B. Div. 1897.

In re M'Donagh.

citation to the next-of-kin) on the ground that the widow Catharine M'Donagh was the sole person entitled to the assets of her husband, they having passed to her under section 1 of the Intestates Act, 1890. In the affidavit filed in support of the application it was stated that John M'Donagh left assets consisting of a small farm of land valued at £59 10*s.*, and household furniture and stock valued at £32 10*s.*, amounting in the whole to £92.

John Murray, in support of the application :—

This case comes under section 78 of the Probate Act, 1857.

The administratrix of Catharine M'Donagh is entitled to administration to John M'Donagh in priority to his next-of-kin. His estate vested in his widow under section 1 of the Intestates Act, 1890 (53 & 54 Vict. c. 29).

[Andrews, J.: It is not proved that the widow was entitled to all the assets. They may prove to be of more value than £500.]

It is sworn that the assets of the husband were of small amount. In *In the Goods of Bryant* (1) the Court granted administration to an executor of a widow under similar circumstances.

The Court made the following order :—

"The Court being of opinion, under the special circumstances of this case, it is expedient to appoint some person to be administrator of the personal estate of the said deceased other than the person who, had the Act of the 20 & 21 Vict. c. 79 not been passed, would by law have been entitled to a grant, it is ordered by the Court that the said Honoria Conlon be at liberty to apply for a grant of administration."

Solicitor for the applicant: *M'Carthy.*

R. W. L.

(1) [1896] P. 159.

IN THE GOODS OF FRANCES LEE (1).

Q. B. Div. Probate. 1897. Nov. 15.

Administration—Limited grant—Absence out of the jurisdiction of administrator—Guardian of next-of-kin—Probate (Ireland) Act, 1857 (20 & 21 *Vict. c.* 79), *s.* 79.

Under the 79th section of the Probate Act, 1857, the guardian of the person and fortune of a minor next-of-kin is entitled to apply for a grant of administration during the absence out of the jurisdiction of the administrator of the deceased, who had left Ireland without administering the assets.

FRANCES LEE, widow, died intestate on 1st July, 1895, leaving two infant children her only next-of-kin. On 18th January, 1896, letters of administration of her personal estate and effects were granted to John Bobbett, the curator or guardian of the two children of the deceased, for their use and benefit, and in the usual terms. The administrator left Ireland in June, 1897, without having administered the assets, and was still absent from Ireland. One of the infant children having died, on the 24th July, 1897, an order was made by the Lord Chancellor appointing Miss Elizabeth Bobbett guardian of the person and fortune of the surviving child Lilian Lee, and giving liberty to the said Elizabeth Bobbett (who was a maternal aunt of the minor) to apply in the Probate and Matrimonial Division for letters of administration to the estate of the deceased, Frances Lee, during the absence of the administrator, John Bobbett. An application was now made to the Court for such limited grant of administration to Elizabeth Bobbett.

Sheil, in support of the application:

By the 79th section of the Probate (Ireland) Act, 1857 (20 & 21 Vict. c. 79), the provisions of 38 Geo. 3, c. 87, are applied to Ireland, and the provisions are made to apply to administrators as well as executors. Where an executor was out of the jurisdic-

(1) Before ANDREWS, J.

Q. B. Div. 1897. *In re* Lee.

tion a limited grant was made to the personal representative of a deceased legatee: *Re Collier* (1); and the words of the statute have been held to extend to the guardian of an infant legatee: *Re Hampson* (2); Tristram and Coote's Probate Practice, pp. 294, 295. On the same reasoning the applicant, as guardian of an infant next-of-kin, is entitled to apply for a grant of administration limited to the absence of the administrator out of the jurisdiction.

The Court made the following order:—

"It is ordered by the Court that the said Elizabeth Bobbett, as guardian of Lilian Lee, in said order of the 24th of July, 1897, referred to, be at liberty to apply for letters of administration of the goods of said deceased for the use and benefit of said Lilian Lee, and limited during her minority, and further limited during the absence of said John Bobbett and until he shall return within the jurisdiction of this Court, upon giving justifying security according to the course of the Court. And it is further ordered that the said Elizabeth Bobbett do have her costs of this motion as part of her costs of such guardian. And it is further ordered that the said original grant of administration granted to said John Bobbett on the 18th of January, 1896, be impounded in the Principal Probate Registry of this Division until further order."

Solicitors for the applicant: *D. & T. Fitzgerald.*

R. W. L.

(1) 2 Sw. & Tr. 444.

(2) L. R. 1 P. & D. 1.

THE DUBLIN, WICKLOW, AND WEXFORD RAILWAY CO. *v.* THE BRAY TOWNSHIP COMMISSIONERS (1).

Q. B. Div. 1897. Nov. 26, 27.

Tramways (Ireland) Acts, 1860, *s.* 38; 1861, *s.* 5—*Township Commissioners —Special meeting—Resolution approving of construction of light railway —Traverse—Jurisdiction.*

Where Township Commissioners having control of the public roads within their township, and acting under the provisions of sect. 38 of the Tramways (Ireland) Act, 1860, hold a special meeting, and pass a resolution approving of the construction of a line of light railway running partly through the said township and partly through an adjoining county, such resolution can, under the provisions of sect. 5 of the Tramways (Ireland) Amendment Act, 1861, be traversed, on the grounds of non-compliance by the promoters with the statutory requirements provided by the same Acts.

Where such a township is situate partly in the county of Dublin and partly in an adjoining county and the proposed undertaking runs partly through that portion of the township which is situate in the county Dublin, a traverse for such non-compliance, so far as the county Dublin portion is concerned, must be entered and tried in the Queen's Bench Division.

It is not necessary that such Commissioners should meet and pass such resolution on a day *before* the meeting of the Grand Jury of the said county; and the fact that such meeting was held a few days subsequently is not in contravention of sect. 38 of the said Act of 1860.

TRAVERSE under the provisions of the Tramways (Ireland) Acts of a special resolution passed by the Bray Town Commissioners approving of a scheme for constructing the Bray and Glendalough Light Railway.

The promoters of the Bray and Glendalough Light Railway proposed to construct a line of light railway commencing in the township of Bray, and thence running through the county of Wicklow and terminating at Glendalough in said county, and for such purpose, duly and in accordance with the provisions in that behalf contained in the Tramways (Ireland) Acts and the Orders

(1) Before O'BRIEN and ANDREWS, JJ.

Q. B. Div. 1897.

D. W. & W. Railway Co. *v.* Bray Town Commrs.

in Council thereunder, published the requisite notices and deposited the necessary maps, plans, sections, books of reference, and all other necessary documents with the proper county officials of the county Wicklow, and also with the proper township officers of the Bray Township. Subsequently the Dublin, Wicklow, and Wexford Railway Company, being a body of persons "interested in contending that such requirements had not been complied with," as designated by sect. 5 of 23 & 24 Vict., c. 152, and acting under the provisions of the same section, duly deposited with the Secretary of the Grand Jury of the county Wicklow, and also with the Town Clerk of Bray, a memorial complaining of non-compliance by the said promoters with the statutory requirements on the preliminaries, and specifically stated in such memorial numerous matters of non-compliance.

The application of the promoters for permission to lay and construct so much of the projected line as was proposed to be laid in the county Wicklow came on for hearing on the 21st of July, 1897, before the Grand Jury empannelled for the Summer Assizes for that county; and the said Grand Jury thereupon proceeded to investigate the matters of non-compliance complained of in the said memorial deposited by the Dublin, Wicklow, and Wexford Railway Company. On such investigation the said Grand Jury resolved that the promoters had not complied with the statutory requirements, and thereupon duly refused to inquire into the *prima facie* merits of the proposed undertaking, and accordingly disapproved of same. The Wicklow Summer Assizes concluded on the 24th of July, 1897, on which day the Judge of Assize left the county. Subsequently, namely, on the 28th of July, 1897, a special meeting of the Bray Town Commissioners (acting as a Grand Jury within the meaning of the provisions of sect. 38 of 23 & 24 Vict. c. 152) was held for the purpose of considering the same scheme so far as it concerned that township; and notwithstanding the matters complained of in the said memorial of the Dublin, Wicklow, and Wexford Railway Co., overruled such complaints, and having then inquired into the *prima facie* merits of the proposed undertaking passed a resolution approving thereof. Thereupon the Dublin, Wicklow, and Wexford Railway Company, acting under the provisions of sect. 5 of 24 & 25 Vict.

c. 102, and sect. 4 of 39 & 40 Vict. c. 65, traversed the said resolution; and on the 29th of July, 1897, and before the hour of 12 o'clock in the forenoon, duly entered same with the Clerk of the Crown for the county of Wicklow, and within three days after the said 28th of July also entered same with the Master of the Crown Office, Queen's Bench Division (1).

The township of Bray which is incorporated under 29 & 30 Vict. c. cclxi. (local and personal), is situate partly in county Dublin and partly in county Wicklow; and a small portion of

(1) The following is a copy of the traverse:—

TRAMWAYS (IRELAND) ACTS.

BRAY AND GLENDALOUGH LIGHT RAILWAY.

Traverse of the Dublin, Wicklow, and Wexford Railway Company of the Special Resolution of the Bray Township Commissioners, being the body having control of the public roads within the Township of Bray, disallowing the objections of the said Dublin, Wicklow, and Wexford Railway Company, upon a memorial duly deposited, complaining of the non-compliance by the promoters, with the requirements contained in the above Acts.

Whereas the promoters of the Bray and Glendalough Light Railway, acting under the provisions in that behalf contained in the Tramways (Ireland) Acts, proposed to make and construct a line of Light Railway, commencing at a point in the Bray Township, comprising portions of the counties Wicklow and Dublin, and thence continuing through the county of Wicklow to Glendalough, as indicated by the plans and books of reference hereafter referred to. And whereas the said promoters, acting under the said provisions, duly deposited a plan and a section of the said undertaking, with a book of reference, with the Clerk and Surveyor of the Bray Township Commissioners and all other necessary parties.

And whereas the Dublin, Wicklow, and Wexford Railway Company, being the owners and occupiers of certain lands proposed to be taken for the purposes of the undertaking are injuriously affected thereby, and being a body interested in contending that the requirements contained in the said Acts had not been complied with, duly lodged with the Secretary of the Bray Township Commissioners, and the Secretary of the said Grand Jury respectively, memorials complaining of non-compliance in certain particulars specifically stated in such memorial.

And whereas the Grand Jury of the said county, being duly empannelled and assembled for fiscal business of the same county for the Summer Assizes, 1897, on the 21st of July, 1897, duly inquired whether the requirements of

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the projected line was proposed to be laid through that portion of the township which is situated in county Dublin. The traverse which concerned only that portion of the projected line which would pass through the county Dublin, came on for hearing before the Divisional Court.

Battersby, for the promoters:—

There is no jurisdiction to entertain the traverse. The application is under 39 & 40 Vict. c. 65, s. 4; but s. 1 of the preamble of that Act shows that the Act deals solely with the county Dublin,

the said Acts were complied with by the promoters, and after such inquiry duly directed that the same had not been complied with, and thereupon duly refused to consider the merits of the said undertaking.

And whereas the said Grand Jury having been duly re-sworn before the Judge of Assize on the 22nd of July, 1897, were on the same day discharged from further attendance at the same Assizes, and the entire business of the same Assizes was concluded on the 24th of July, 1897, when the said Judge of Assize left the said county.

And whereas the said Bray Township Commissioners, on the 28th of July, 1897, being a day later than and not as nearly as might be corresponding with the Summer Assizes for county of Wicklow, 1897, proceeded on the application of the said promoters to inquire whether or not the requirements contained in the said Acts had been complied with.

And whereas, upon hearing evidence, the said Bray Township Commissioners, by a majority, overruled the said complaint of the said Dublin, Wicklow, and Wexford Railway Company, and proceeded to inquire generally into the merits of the proposed undertaking.

Now the said Dublin, Wicklow, and Wexford Railway Company hereby, and without prejudice to their legal rights, and adopting such course in the premises as they may be advised, traverse the said decision, and the Special Resolution of the said Bray Township Commissioners embodying the same, and claim that the statutory requirements under the Tramways (Ireland) Acts have not been complied with in the particulars specifically stated in the Memorial hereinbefore referred to and in the schedule hereunto annexed.

Dated the 28th July, 1897.

(Signed), G. Keogh & Sons,
Solicitors for the Traversers.

Schedule

(Containing particulars of objections.)

so far as it is within the jurisdiction of the Grand Jury. The township of Bray had been given jurisdiction over such lands of the township as were lying in the county Dublin ten years earlier than the passing of the Act of 1876. A traverse lies from the Commissioners of Bray to the Assizes at Wicklow under sect. 5 of the Act of 1860, and sect. 5 of the said Act of 1861; and there was therefore no necessity for giving a right of traverse to the Queen's Bench Division. The preliminaries were complied with. By sect. 2 of the said Act of 1860 the necessary preliminaries are provided for by lodgment, advertisement, &c.; and if such lodgments and advertisements have been effected the Grand Jury cannot inquire into the details of the matters stated therein.

Gordon, Q.C. (with him, *Brett*), for the traversers:—

The Divisional Court has jurisdiction. Under sect. 38 of the Act of 1860 the Bray Commissioners stand in the place of the Grand Jury of county Dublin. The Act of 1861 amends that of 1860, and is read as one therewith, and under sect. 5 of the later Act a traverse lies. The right of appeal conferred by the 38th section of the said Act of 1860 does not get rid of the right of traverse; and under the Act of 1876, which deals with county Dublin, and is read as one with the said Acts of 1860 and 1861, it is clear that the township of Bray is *quoad* the portion thereof in county Dublin, in the place of the Grand Jury of county Dublin. Therefore, *quoad* county Dublin, the traverse lies to the Queen's Bench Division. The Grand Jury are not confined to investigating as preliminaries the mere questions of lodgments, advertisements, &c., but clearly can investigate whether the statutory requirements comply in form and fact with the details thereof provided in the said Act of 1860 and the schedules thereunto.

[At the suggestion of the Court, counsel for the promoters then adduced evidence that the statutory requirements had been complied with: the Court intimating that at the conclusion of the case they would decide the question of jurisdiction to entertain the traverse.]

At the conclusion of the evidence the Court held that the promoters had substantially complied with the statutory requirements,

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and that the objections for non-compliance relied on by the traversers should be overruled, and the traverse disallowed. The following are the portions of the judgments conversant with the question of the jurisdiction of the Queen's Bench Division to hear the traverse.

O'Brien, J.:—

I am of opinion that this Court has jurisdiction to hear this traverse. The Bray Township Commissioners having under their Local Act of 1866 control of the roads within the township, are to all intents and purposes a Grand Jury within the meaning of sect. 38 of the Act of 1860. Reading the Acts of 1860 and 1861 as one Act, it is clear a traverse lies under sect. 5 of the Act of 1861, whether the approval traversed be that of a Grand Jury or Town Commissioners acting as a Grand Jury. The Act of 1876 must be read as one with the two former Acts; and accordingly I think the Bray Commissioners must, so far as the portion of the township in county Dublin is concerned, be deemed to stand in the place of the Grand Jury of county Dublin. Sect. 4 of the Act of 1876 clearly provides that a traverse from the Grand Jury of county Dublin must be tried in this Division (formerly the Court of Queen's Bench). I therefore think that this Court has jurisdiction to try this traverse, so far as the undertaking in county Dublin is concerned.

Andrews, J.:—

I am also of opinion that this Court has jurisdiction to hear and dispose of this traverse by which the Dublin, Wicklow, and Wexford Railway Company traverse the approval given by the Bray Township Commissioners of the undertaking of the Bray and Glendalough Light Railway or Tramway so far as it is intended to be constructed within the Bray Township. The *locus standi* of the traversers to appear and object before the Township Commissioners seems clear and has not been questioned. The traversers having duly deposited their memorial setting forth their objections (which related to the alleged non-compliance by the promoters with the preliminaries required by the Tramway Acts for their application for the approval of the Township Commissioners)

were heard by the Township Commissioners, and their objections were disallowed.

A portion of the proposed light railway is intended to be constructed in that part of the Bray Township which lies within the county Dublin; and the rest of it within the county Wicklow.

The public roads within the Bray Township are under the control of the Township Commissioners (29 & 30 Vict. c. cclxi. (Local), sect. 22). The Tramways Act, 1860 (23 & 24 Vict. c. 152), by its fifth section, as amended by the Act of 1861 (24 & 25 Vict. c. 102, sects. 2 & 3) provides for the inquiry before the Grand Jury of the county as to whether the promoters who seek their approval have complied with the statutory requirements. Section 6 of the Act of 1860 provides for the case of a proposed tramway not lying wholly within one county, in which case the provisions of the Act are made applicable to every county within which any part of it lies, and section 38 of the same Act provides that where a proposed tramway lies wholly or partly within a district in which the public roads are not under the control of the Grand Jury of the county, the body (in the present case the Bray Township Commissioners) having the control of the public roads in such district shall be in the place of the Grand Jury of the county, with all the like rights, powers, and duties. By the above Act of 1861 (sect. 1) the Act of 1860 and the Act of 1861 are to be read together as one Act, and by the fifth section of the Act of 1861 any person entitled to appear on the inquiry before the Grand Jury may, in case of their approval, traverse such approval, on the grounds therein mentioned (one being non-compliance with the statutory preliminaries), such traverse to be tried at the Assizes. Then comes the Tramways Act, 1876 (39 & 40 Vict. c. 65), which amends and varies the Acts of 1860 and 1861 as regards their application to the county of Dublin and the county of the city of Dublin respectively, and provides by sect. 4 that any person entitled to appear on the inquiry before the Grand Jury, or the Municipal Corporation of Dublin, as the case may be, may, in case of their approval of the undertaking, traverse such approval, such traverse to be entered with the Master of the Crown Office of the Court of Queen's Bench, and to be on either of the grounds therein stated, one being non-compliance by the promoters

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with the statutory preliminaries; and the section proceeds to enact that in the case of a traverse on this ground (which is the present case) the same shall be disposed of by the Court of Queen's Bench after hearing such evidence as may be adduced. The seventh section of the Act of 1876 provides that this Act and "The Tramways Acts" (*i. e.* the Acts of 1860 and 1861), save so far as the same are varied by this Act, shall be read together as one Act. Reading all these Acts, then, as one Act, we must read in the 38th section of the Act of 1860. Under it the Bray Township Commissioners are in my opinion put in the place of the Grand Jury of the county of Dublin in respect of so much of the proposed tramway as lies within the county of Dublin, and the words "the Grand Jury" in the fourth section of the Act of 1876 must, in my opinion, in relation to the traverse now before us, be construed as referring to the Bray Township Commissioners, under whose control the public roads within their township have been placed; and the Bray Township includes that part of the county of Dublin within which the proposed light railway or tramway is proposed to be constructed.

The traverse in question of the approval by the Bray Township Commissioners, already referred to, is therefore, in my opinion, rightly brought before this Court.

As regards the objection which was rather suggested than actually relied on to the approval of the Bray Township Commissioners, namely, that their meeting was not held at a time "as nearly as may be corresponding with the time of the Summer Assizes," as provided by the 38th section of the Act of 1860, inasmuch as it was not held until a few days after the county of Wicklow Summer Assizes had concluded, I am unable to construe the 38th section so as to make that fact a fatal objection to their approval, although I think it would have been better and more convenient to have held the Commissioners' meeting before the Assizes. The objection was that the meeting was not held before the Assizes, but the 38th section does not require that the meeting should be held *before* the Assizes, which could have been easily done had the Legislature so intended, and circumstances might exist which would make it inexpedient to hold, or would interfere with or possibly prevent the holding of a meeting of

the Commissioners *before* the Assizes, and *also* at a time "as nearly as might be corresponding" with the holding of them. I therefore think that this objection fails.

[His Lordship then dealt *seriatim* with the several specific objections as regards non-compliance with preliminaries which were relied on by the traversers, and in relation to which evidence had been given on behalf of the traversers and the promoters respectively, and held that although certain discrepancies existed in some of the plans, sections, and books of reference, the statutory requirements had been substantially complied with, and that other objections had been explained and removed by the evidence of the promoters' engineer.]

The traverse must therefore be disallowed, but without costs. The Acts make no express provision as to the costs of this traverse; but we do not decide whether they could be awarded or not, as even assuming that we could award costs against the traversers, we would not do so, having regard to the facts and circumstances of this particular case.

Solicitors for the traversers (D. W. & W. R. Co.): *G. Keogh & Son.*

Solicitors for the promoters: *Molloy & Molloy.*

J. P. B.

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O'CONNOR *v.* GRAND INTERNATIONAL HOTEL CO., LIMITED (1).

(1897. No. 3175.)

Innkeeper—Liability ultra £30*—Deposit—Deposit expressly for safe custody—Negligence—Contributory negligence—Non-disclosure of value or nature of goods deposited—Innkeepers Act*, 1863 (26 & 27 *Vict. c.* 41), *s.* 3.

The plaintiff went as a guest to the defendants' inn. While there a parcel (containing jewellery) was sent to him on approval. On receiving the parcel the plaintiff handed it to the manageress at the office or bar, saying, "Keep that for me," but not stating anything as to its value or contents. The parcel was stolen, but not through the wilful act, default, or neglect of the defendants, or any servant in their employ. The usual notices in compliance with the Act were hung up in the inn. The plaintiff, who had paid the jeweller the value of the parcel (£186), having brought this action for damages for its loss:—

Held (on new trial motion), that the non-disclosure by the plaintiff of the value and contents of the parcel did not amount to contributory negligence on his part; but that the deposit was not a deposit "expressly for safe custody" within the Innkeepers' Act, 1863; and that therefore, in the absence of evidence of any wilful act, default, or neglect on the defendants' part, the plaintiff could not hold them responsible to a greater amount than £30.

A guest who deposits an article with an innkeeper cannot, in the absence of default or neglect, hold the innkeeper responsible to a greater amount than £30 for its loss, unless, when making the deposit, he informs the innkeeper, in a reasonable and intelligible manner, that the deposit is for the safe custody of the article.

NEW TRIAL MOTION.

On the 20th March, 1897, the plaintiff went as a guest to stay at the defendant Company's inn at Bray. On the same day, shortly after his arrival, a messenger from a Dublin jeweller brought to him a small box, containing some £186 worth of jewellery. Immediately after the box had been given to him in the hall of the hotel, the plaintiff went across to the bar or office and handed it to the manageress, saying (as the plaintiff deposed)

(1) Before MURPHY, GIBSON, and MADDEN, JJ.

"Keep that for me, I shall probably want it to-morrow." The account given by the manageress was that the plaintiff had said when handing her the box, "Will you leave that there for me." Nothing was said as to the nature or value of the contents. The parcel was placed on a shelf in the office; it was there when the manageress left in the evening, and the manager was shown it before locking up the office. The manageress did not notice whether it was there the next day, Sunday; but, on that evening, the plaintiff asked another employée, then in charge of the office, for the parcel; she could not find it, and the plaintiff then said that it would do next morning. On Monday morning he asked the manageress for it; and she discovered that it was missing. The plaintiff then said that the parcel contained valuable jewellery, but that he did not exactly know the value himself; the manageress replied that he should have told her, and that then she would have locked it up in the safe. There was no suggestion in the evidence inculpating anyone. On the 6th April, after search had been made for the box without result, the plaintiff, who had to pay £186 2*s.* to the jeweller, finally instituted the present action for £200, damages for its loss, alleging that such loss had occurred through the neglect or default of the defendants or their servants, and that the parcel had been deposited "expressly for safe custody" with the defendants. The defence was substantially a traverse of the plaintiff's ownership of the parcel, a traverse of the alleged loss through any wilful act, default, or neglect, a traverse of any deposit expressly for safe custody, and a plea that the defendants, having complied with (as was proved), were entitled to the benefit of, sect. 3 of the Innkeepers' Act, 1863. A plea of contributory negligence was added, by permission, at the trial.

At the trial, before Mr. Justice O'Brien, the following questions (subject to objections) were, with suitable directions, left to the jury: 1, "Was the parcel stolen or lost through the wilful act, default, or neglect, of the Company or any of their servants? (*Answer*, "Yes.") 2, "Was the parcel deposited expressly for safe custody?" (*Answer*, "Yes.") 3, "Did the plaintiff act with the ordinary care that a prudent person would have used, and was it in consequence of such want of care that the parcel was stolen or lost? If the third question be answered for the defendants,

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the jury need not discuss the question of damages." (No answer.) 4, "Even if the plaintiff was negligent, could the Company by the exercise of ordinary and proper care on their part have avoided the consequence of the plaintiff's negligence?" (No answer.)

The Judge had directed the jury that unless the first or second questions were answered in the affirmative the damages could not exceed £30, and had stated to counsel that he did not leave the general question of damages to the jury, as no question had been asked in regard thereto, and as he doubted that there could be any other measure than the price paid to the jeweller. Upon these findings the learned Judge discharged the jury, as in the case of a disagreement, and declined to enter judgment for the plaintiff, leaving him to move the Court.

Counsel for the plaintiff now moved that judgment be entered for him in the action for £186 2*s*. and costs. A cross notice was served on the defendants' behalf to set aside the findings of the jury on the first and second questions.

Wright, Q.C., Bourke, Q.C., and *Molony*, for the plaintiff.

Sullivan, Q.C., O'Shaughnessy, Q.C., and *T. M. Healy*, for the defendants.

The following authorities were cited during the argument:— *Moss* v. *Russell* (1); *Spice* v. *Bacon* (2); *Walker* v. *Jackson* (3); *Batson* v. *Donovan* (4); *Roche* v. *Cork and Passage Railway Co.* (5); *Smith* v. *Dearlove* (6); *Greenland* v. *Chaplin* (7); *Dawson* v. *Chamney* (8); *Cashill* v. *Wright* (9); *Huntly* v. *Bedford Railway Co.* (10); *Morgan* v. *Ravey* (11); *Armistead* v. *Wilde* (12); *Herbert* v. *Markwell* (13); *Robins and Co.* v. *Gray* (14); *Gordon* v. *Silber* (15); *Oppenheim* v. *White Lion Hotel Co.* (16).

(1) 1 *Times'* Rep. 13.
(2) 36 L. T. (N. S.) 896.
(3) 10 M. & W. 161.
(4) 4 B. & Ald. 21.
(5) 24 L. R. Ir. 250.
(6) 6 C. B. 132.
(7) 5 Ex. 248.
(8) 5 Q. B. 164.
(9) 6 E. & B. 891.
(10) 7 *Times'* Rep. 641.
(11) 6 H. & N. 265.
(12) 17 Q. B. 261.
(13) 45 L. T. 649.
(14) [1895] 2 Q. B. 501.
(15) 25 Q. B. D. 491.
(16) L. R. 6 C. P. 515.

MURPHY, J.:—

Having formed a clear opinion on this case, it would be useless to reserve our judgment. The plaintiff has sued the defendants for £186, alleging that the latter are liable to him to that amount for jewellery of the plaintiff's, lost in their hotel, and that he is entitled to recover the full value of the articles. This claim is resisted by the defendants, on the ground that they are protected by the provisions of the Innkeepers' Act, 26 & 27 Vict. c. 41. From the evidence given at the trial it appears that the plaintiff, who had gone to the International Hotel at Bray as a guest, directed that some jewellery should be sent to him there on approval. It came shortly after his arrival at the hotel, and he handed the parcel to the manageress, asking her to "keep this for me" (as he says), or, as she states, "Leave this here for me." It is immaterial which of the two accounts the jury believed. I agree with the observation of Mr. Justice Madden, made during the course of the argument, that neither phrase in the slightest degree would indicate to her that the box was handed to her expressly for safe custody at the hotel. She herself stated, in answer to the Judge, that if any intimation had been given to her that any especial care was necessary by reason of its value, as a matter of course she would have got it locked up in the safe. There was nothing said, in my opinion—and I believe that the other members of the Court agree with me in this—to intimate to her when receiving the parcel that it was of any special value or required any special care on her part. It was handed in to her at the bar as an ordinary parcel. She did not think that the owner was particularly concerned about it on account of any value it possessed; and nothing indicated to her that any especial care should be taken of it. Now, had the loss occurred before the passing of the Innkeepers' Act, it is obvious that the defendants would have been liable for the full value of the jewellery; but, happening to-day, the defendants are, in my opinion, entitled to the protection thereby given. What, then, should be the result in this case? The third section of the Innkeepers' Act, 1863, provides:—

"No innkeeper shall, after the passing of this Act, be liable to make good to any guest of such innkeeper any loss or injury to goods or property brought

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to his inn . . . to a greater amount than the sum of £30, except in the following cases, that is to say:—1, where such goods or property shall have been stolen, lost, or injured through the wilful act, default, or neglect of such innkeeper or any servant in his employ; 2, where such goods or property shall have been deposited expressly for safe custody with such innkeeper:

"Provided always that in the case of such deposit it shall be lawful for such innkeeper, if he think fit, to require, as a condition of his liability, that such goods or property shall be deposited in a box or other receptacle, fastened and sealed by the person depositing the same."

It was held by the jury in this case that there was negligence sufficient to bring the case within the first exception. We are of opinion that there was no evidence to sustain such a verdict. There was no suggestion made here during this argument, nor can we see that any suggestion was made at the trial or evidence offered that the property was stolen or lost through the wilful act, default, or neglect of the defendants, or any servant or employée for whom the defendants would be responsible. Putting the word "wilful" aside, in what respect did the innkeeper, or the young lady who was acting as manageress at the time, commit any default? She did substantially what she was asked to do. The plaintiff must show in what the alleged default consisted; but there was nothing in the words used by him, or in her reply, to intimate that she was omitting to do anything that he requested her to do or that she should have done. He seems to have been quite satisfied, and she appears to have thought that she had fully complied with his request in putting the box inside the bar and leaving it there. The plaintiff can make nothing out of the word "neglect." There was no "default," there was no "neglect," there was nothing, in my opinion, that could by any possibility be construed into default or neglect on her part; she did what was right and proper under the circumstances. If one is to speak of neglect or default in the case at all, it seems to me that the box was obviously lost through the negligence or oversight of the plaintiff himself in not communicating to the manageress the nature of the articles it contained, or intimating to her that he gave it to her for safe custody.

Under these circumstances I am of opinion that there was no evidence at all adequate to sustain the verdict found by the jury. With respect to the second branch of the case, whether

the plaintiff is entitled to a verdict for £30, the question is whether or not he was guilty of such negligence on his part as would have deprived him, if this Act had never been passed, of the right to treat the hotel-keeper as his special bailee, or as liable, no matter how the property was lost, to the extent of the loss sustained. In my opinion, supposing this case to have occurred before the passing of the Innkeepers' Act, there would be nothing at all in it to disentitle the plaintiff to the full benefit of the law as it then stood, regulating the liability of an innkeeper for the property of his guest. This box was unquestionably the property of the plaintiff; if it had been left in his room the innkeeper would have been liable, or if it had been left in his portmanteau;—*a fortiori*, if he had brought it downstairs to the office, whether for convenience or thinking that it would be safer there, the innkeeper would be responsible. There is nothing, therefore, to show that the plaintiff acted with such neglect or want of care as would deprive him of the law in his favour. He would have been held to be entitled to recover the full value of the property if the Act of 1863 had not been passed. The Act of 1863 was interposed to prevent him recovering any sum greater than £30, but below that limit he has still the same rights and advantages as he would have had if the Act had never been passed. Under the circumstances, therefore, I am of opinion that a verdict should be entered for £30 in the plaintiff's favour.

GIBSON, J.:—

This case is of some importance. The amount involved is large, and it comes before the Court in a somewhat unusual way. There was no assessment of damages at the trial; the Judge left four questions to the jury; they answered only two; he declined to accept their findings as a verdict, and discharged them as in case of a disagreement. It is insisted by the plaintiff's counsel that their client is entitled to a verdict for £186, although no verdict has been recorded. The facts have been so fully noticed by my brother Murphy that I need not repeat them. The first two points argued constitute, if well founded, a defence to the entire action; the other two go to the cause of action only so far

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as relates to the difference between a verdict for £30 and one for £186. The first point on which the defendants relied was that the plaintiff, by not disclosing the value of the parcel, was guilty of contributory negligence, as he thereby threw the barmaid off her guard, who, if the value had been disclosed, would have locked up the box in the safe. The difficulty in the defendants' way is, that the omission of the plaintiff to disclose the nature of the contents does not appear to have been directly connected in any way with the theft. There was nothing in the appearance of the parcel to suggest that it contained valuables. Whether it contained cigarettes or bank notes, that would not affect the theft. There is no evidence that the plaintiff communicated to any one that it contained jewellery. It would be difficult for us to say that he was precluded from relief upon the ground of contributory negligence, because the box happened to contain jewellery instead of articles of trifling value. Of what value must an article be so that the deposit of it without a disclosure of its nature will be evidence of contributory negligence? Is it £20, or £40, or £100? The principle taken from the law of common carriers, and extended by Best, J., in *Batson* v. *Donovan* (1), to innkeepers is, that there is no common law obligation to make disclosure. The innkeeper is under an unqualified duty to keep the goods in safety, unless lost or destroyed by the act of God or the king's enemies, or by the negligence of the guest himself. There may be another class of case, not noted in the books, which perhaps should be added, where the loss occurs from the peculiar nature of the goods themselves. Upon the first point, therefore, the suggested negligence of the plaintiff, the defendants are not entitled to succeed. Morally, I feel considerable sympathy for them; for I think that the plaintiff should have disclosed the nature of the parcel. I am inclined to think a guest may by his conduct preclude himself from recovering on the basis of the real value of the goods lost, but such a defence, which goes to the amount of damages only, is not properly before us.

The second point on which the defendants rely is, that the plaintiff was not in a position to sue as the owner of these goods.

(1) 4 B. & Ald. at p. 27.

The innkeeper, it was vigorously urged by Mr. O'Shaughnessy, had no lien on these goods; they had been sent on approval, and had been left at the office in a temporary way. In my opinion the plaintiff, as bailee of these goods, was liable to return them to the shopkeeper; he has in fact since been obliged to pay for them; and there is no doubt that the innkeeper's lien extended to the articles in question. Whoever the owner was, they were brought as his own goods by a person whom the innkeeper received as a guest.

These are the first two questions which, it was argued, constitute defences to the whole cause of action. In my opinion the defendants have failed on both of them. The matter remains whether they are to be absolved from liability ultra £30. The Act of 1863 left the liability of innkeepers, up to £30, the same as it stood before at common law. Over that amount it relieved them from liability save in certain events. The first question which the learned Judge put to the jury was: Was the parcel lost by the wilful act or neglect of the hotelkeeper? The onus of proof as to this lay on the plaintiff. As to wilful act, the onus would have been satisfied by offering reasonable evidence that the goods were stolen by the defendants' servants. There is no tangible suggestion that any particular person stole this property, certainly none that it was stolen by any employee of the defendants. So far as I can understand, the evidence rather suggests that the parcel was stolen by some outsider. It was locked up when the manager went away; it does not appear that the lock was broken or tampered with. It is not suggested that the manager stole the articles; that would be a cruel and unfounded suggestion, and it was not made either here or at the trial. As to default or neglect, this point seems to be the strongest part of the defendants' case. The defendants would not have treated this property as they did, if they had been aware of its value. They treated the box, as they were entitled to do under the circumstances, as if it had contained cigarettes. What happened in fact here was what happens everywhere; the goods were left temporarily with the young lady at the bar; it was not supposed that they were to be put away in a safe, out of the reach of the owner, who might at any moment ask for them. We are not

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to assume that there was neglect simply because the property was valuable. The box was treated with reasonable care, on the assumption that it was an ordinary parcel.

The remaining question is one of considerable difficulty:—Was the property deposited expressly for safe custody? Mr. Wright and Mr. Bourke argued that the Act of Parliament meant that if the goods were deposited at all with the hotel-keeper, he should be responsible. The statute says that the deposit shall be expressly for safe custody. What does that mean? A guest has a parcel; he passes the bar, and says to the person in charge, Take care of this parcel for me; keep it safe, and give it back to me in an hour. So far as words go, that is a deposit for safe custody in the sense that he asks to have it safely kept; but is it within the statute? I think not. The Court is bound to state the meaning which it attributes to the Act of Parliament; and, in my opinion, a person who is making such a lodgment or deposit for the purpose of visiting the innkeeper with liability in case of its loss, must express to the innkeeper what the object of the deposit is, if he would bring himself within the terms of the statute. It does not depend upon the form of the words used, but a depositor should in some reasonable and intelligible way convey that the object of the deposit is safe custody. It is very likely in the present case that the plaintiff, being a solicitor and knowing of the provisions of this statute, intended to make a deposit under the Act; but was this in the mind of the barmaid? This deposit was a casual, friendly, temporary one with the young lady at the bar, for the convenience of the hotel guest, and was not an official formal deposit such as the Act contemplates. No doubt the plaintiff, in making a deposit, was not bound to disclose the contents or to fix a value. If it had been a deposit under the Act it would have lain on the custodian to ascertain the value, and take proper care accordingly. But here the evidence repels the inference that there was any statutory deposit.

Under the circumstances of the case, therefore, I think that the defendants have entirely failed to show that the plaintiff has lost his remedy altogether by reason of any contributory default on his part, or on the ground that he was not the owner of the goods. In my opinion he was owner of the goods as against the

hotelkeeper; but, in regard to the amount recoverable, he is met by the protecting enactment of the Act of 1863, and his damages must be limited to £30. This is all that he is entitled to get, and therefore verdict and judgment will be entered for him for that amount.

MADDEN, J.:—

Upon one branch of this case I felt some difficulty during part of the argument. I refer to the portion of the case conversant with the plea of negligence. I adopt the test in the words of Mr. O'Shaughnessy: "Is there any evidence fit to be submitted to a jury that the goods were stolen through default of the plaintiff?" Well, undoubtedly, in one sense, they were. If the plaintiff had made a certain statement that he did not make, they would not have been stolen. If, when depositing the goods, he had said that they were of considerable value, I believe, from the evidence, that they would have been locked away in safety. But that by no means settles the question whether it was negligence on the plaintiff's part, in the legal sense of the term, not to have made this statement. I am satisfied that it was not. I agree that, for the purpose of this discussion, the case must be considered independently of the Innkeepers' Act. So considered, I think the case a plain one. The goods had become, sufficiently for the purposes of this action, the property of the plaintiff. If he had left the articles in his bedroom, the innkeeper would, before the Act, have been liable for the whole amount of their value, and would still, after the passing of the Act, be responsible to the extent of £30. In testing the question of negligence on the part of the plaintiff, we must see what actually occurred. Instead of leaving the box in his bedroom, he left it in what would be generally considered a safe part of the hotel; he took precautions that were good up to a certain point; but he did not go further and complete those precautions. In the common language of every-day life, perhaps this might be called negligence; the plaintiff certainly would have acted more prudently had he announced the value of the property. But the cases referred to clearly show that with regard to innkeepers as well as with regard to common carriers, there is no obligation to declare the value of the goods committed to them.

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Though, in the popular sense of the words, the plaintiff may have been in default, I am clearly of opinion that in the legal sense there was no default or negligence on his part.

I agree with my brethren in their view of the two questions which arise under the Innkeepers' Act. With regard to a deposit for safe custody, I agree that there must be something stated, substantially, though not necessarily formally, disclosing to the innkeeper the nature and object of the deposit. The Act of Parliament requires the deposit to be made expressly for custody that is to be safe; and, on the occasion of the deposit by the guest, the statute gives to the innkeeper an important option—an option which he cannot have any opportunity of exercising unless there be something to suggest to his mind or to the mind of his agent the idea of a transaction under the Act. There need not be, and my brother Gibson did not suggest that there necessarily should be, any express reference to the Act, but there must be something sufficiently plain to show the nature of the transaction. The innkeeper must be placed in a position to exercise, if he will, the option which is given to him of refusing to undertake the responsibility of safe custody unless the precautions mentioned in the section are first taken. In my opinion, the words "keep this for me," addressed to a barmaid—taking the version which is most in the plaintiff's favour—do not imply, much less express, the idea of a deposit such as is contemplated in the Act of Parliament.

The Order of the Court was:—

"On motion, &c., the Court, being of opinion that there was no evidence to go to the jury on the first and second questions submitted to them, and that there was no evidence of negligence on the part of the plaintiff directly contributing to the loss, and it being admitted that the value of the property exceeded £30, doth order that a verdict for £30 damages, and judgment thereon, with costs, be entered for the plaintiff, and that both parties abide their own costs of this motion" (1).

Solicitor for plaintiff: *M. J. O'Connor.*
Solicitor for defendants: *M. J. Hanmore.*

A. E. R. J.

(1) An appeal was taken by the plaintiff, but when the case was called it was stated that all or most of the articles of jewellery had been just discovered

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Loan Fund Act (6 & 7 *Vict. c.* 91)—*Statutory loan by Loan Fund Society—Loan to person not residing within the district defined by the rules of the Society—Recovery of amount advanced—Jurisdiction of Justices—Statutory promissory note—Renewal of outstanding note.*

The Enniskillen Loan Fund Society was duly formed under The Loan Fund Act, 6 & 7 Vict. c. 91, which provides that, "subject to the restrictions and regulations" therein contained, Loan Fund Societies might be formed in Ireland "in any district or place in which it shall be proved to the satisfaction of the Loan Fund Board that such society is required," and may raise a fund "for the purpose of granting loans to the industrious classes resident therein;" and that it should be lawful for such society from time to time to make, subject to the restrictions contained in the Act, "rules for the better government and guidance of the same, and for defining the district . . . within which the operations of the society ought to be conducted;" such rules, when duly approved of, to be binding on the society and borrowers; no loans to be made on personal security to any one individual at any one time exceeding the sum of £10; no second or other loan to be made to the same individual until the previous loan be paid off; and every promissory note for the repayment of a loan to be on a certain printed form (to be supplied by the Board) to be made payable to the secretary or treasurer for the time being, and not to be chargeable with any stamp duty. In case of default in repayment it is provided by section 30 that it shall be lawful for Justices at Petty Sessions to make an order for payment.

The defendant, a person not residing within the district defined by the society's rules, was sued at Petty Sessions on foot of a promissory note for £10 (drawn on the statutory form), signed by him and two sureties. The note was the last of a series of renewals of an original note made several years previously. On Case Stated:—

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in a field at some distance from the town. The hearing of the appeal was thereupon adjourned to allow the parties to consider what course they would take, and, on the 13th December, 1897, the appeal was withdrawn by consent, the plaintiff retaining the articles and his judgment for £30 and costs of trial. —[REP.]

(1) Before SIR P. O'BRIEN, L.C.J., and O'BRIEN, HOLMES, and GIBSON, JJ.

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Held (*per* Sir P. O'Brien, L. C. J., Holmes and Gibson, JJ., *diss.* O'Brien, J.) that the loan, being made to a person not residing within the defined district, was unauthorized as a statutory loan, and invalid; that the special summary jurisdiction, conferred by sect. 30 on Justices at Petty Sessions, was restricted to authorized advances, and that therefore the complaint should have been dismissed without prejudice.

Per O'Brien, J. (*diss.*), that the loan, though unauthorized, was nevertheless recoverable before Justices under the provisions of sect. 30.

Quære, is such an advance recoverable by action?

Quære, is a renewal of such a promissory note authorized or legal?

CASE STATED for the opinion of the Queen's Bench Division, pursuant to 20 & 21 Vict. c. 43, by the Justices of county Fermanagh, sitting at Enniskillen Petty Sessions, on the 30th November, 1896, on the hearing of a complaint by the treasurer of the Enniskillen Loan Fund Society against Michael Green, John Green, and Bernard Monaghan, under the 6 & 7 Vict. c. 91, "To show cause why they neglected to pay him, the plaintiff, the sum of £10 2*s.* 6*d.*, being the amount alleged by the plaintiff to be due to him, the said treasurer of the said Loan Fund Society, on their note, bearing date the 30th day of January, 1896, and for fines incurred under the rules of said society." The note, which was on the paper and in the form issued by the Loan Fund Board, was a joint and several note, made by the defendant M. Green, as principal, and J. Green and B. Monaghan as sureties, for £10, together with all fines which might be incurred by them, or any of them, under the rules of the society, payable, at the times and in the manner prescribed by such rules, "to Archdeacon Smollen, the treasurer for the time being of the Enniskillen Loan Society."

The Justices held that they had no jurisdiction, but stated this case on the request of the complainant.

The facts proved at the hearing, as set out in the case, were these. The defendants had signed the note in question on the 30th January, 1896. The requisite notices of their principal's default had been served on the two sureties, there being then due on foot of the note the sum of £10 for principal, and 2*s.* 6*d.* for fines incurred under the rules. No money, however, had been advanced to any of the defendants on the 30th January, 1896,

nor for many years previous, this note being the last of a series of renewals of an original note given more than seventeen years ago. It had been the custom of this society to allow borrowers to renew their loans every three months, the borrowers first paying all fines incurred under the previous note, and the interest which would accrue due on the new note, in the present case in all amounting to the sum of 9*s.* 4*d.* The defendant had already paid £44 to the society, by way of renewal fines and interest on the original note. The principal defendant resided in Killee, which is in the Petty Sessions District of Enniskillen, but in the parish of Magheracross, which was not within the district mentioned in the first rule, and his residence was more than five miles distant from the office of the society. It further appeared that the principal defendant had obtained this loan notwithstanding the fact that he was already surety for another borrower who was still indebted to this society, and that another of the defendants, John Green, who was a surety on the note now sued for, had been accepted as such surety notwithstanding the fact that he was himself a borrower from the society, and indebted to them at the time he was so accepted, contrary to the 19th rule of said society. It was further proved that the Very Rev. Thomas Smollen was the treasurer of the society at the time of the issuing and serving of the summons, but that he had ceased to be treasurer prior to the hearing of the summons, and that Mr. Alexander Ellis had become treasurer.

For the defendants it was contended before the Justices:—

"1. That the custom of allowing renewals was illegal, as it was in fact making a second loan to one individual before the previous loan had been repaid, contrary to 6 & 7 Vict. c. 91 (The Loan Fund Act, 1843, section 24), and that therefore the plaintiff could not recover the amount sued for, as the said society had acted in excess of its powers; or, in the alternative, that the defendants were entitled to take an account of all moneys paid by them for fines and interest since the original note became due, and deduct same from the principal as same had been illegally and improperly paid.

"2. That, as the residence of the borrower was more than five miles distant from the office of the society, and that, as the parish

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of Magheracross, in which the borrower resided, was not situate within the district as set forth in the rules of the society, therefore the said society had exceeded their powers, and could not recover the amount advanced, because the rules had all the force of an Act of Parliament.

"3. That the rules of said society having been further violated, by advancing money to the borrower at the time he was surety on a current note for another borrower, and by accepting as sureties persons who were themselves indebted at the time to the society, the jurisdiction of the justices under the Loan Fund Act was ousted.

"4. That the plaintiff could not succeed in the present summons owing to the change of treasurer between the issue and the hearing of the summons.

"5. That, even if the justices felt compelled to grant a decree on the said complaint, that they had no power to grant more than 2*s*. costs under the provisions of said Act."

For the plaintiff, it was contended:—

"1. That the custom of renewing notes was not illegal, as section 24 only referred to concurrent loans; that, in the case of a renewal, the old note was paid and extinguished by the new note and no new advance was made; that, even if it were contrary to the section, it would not be competent for the borrower to take advantage of the illegality; and that such irregularity would not oust the jurisdiction of the justices or prevent the loan society from recovering the amount due.

"2. That section 9 of the 6 & 7 Vict. c. 91, which enabled the loan fund society to make rules, did not enact that these rules should be mandatory on the loan fund society, as they were merely 'for the better government and guidance of the same, and for defining the districts by townlands or otherwise within which the operations of the society ought to be conducted,' and that, as these rules were only enabling, any breach of them, or of the Act, in the manner in which the operations of the society were conducted, would not affect the rights of the society to recover the sums advanced.

"3. It being admitted that the society had advanced money to the borrower contrary to the provisions of the 19th rule, it was

contended that such irregularity did not preclude the society from recovering the amount due, and that the punishment for such irregularity was provided for by the Act and was to be exercised by the Loan Fund Board.

"4. It was also contended generally on behalf of the plaintiff:—1, That the justices had nothing to do with the rules of the society except in so far as they enabled the society to do certain things; and that the only matters for the consideration of the justices were (as mentioned in section 30, of said Loan Fund Act)—1, whether the summons was duly served; 2, whether the amount sued for was due; and 3, whether the note or security was in the form and on the paper issued by the said Loan Fund Board; and that, if these were correct, the justices were bound to grant a decree; and further, that the provision of the Loan Fund Act, as regards costs, had been virtually repealed by the Petty Sessions Act, and that the justices were now enabled to grant all costs incurred, not exceeding 20*s*."

The justices were of opinion:—"1, that the 24th section of said Loan Fund Act did not apply to the custom of renewing notes, and that the plaintiff's contention was right in point of law; 2, that, as the borrower did not reside within the district mentioned in rule 1, and as the society had made the said advance contrary to the provision of rule 19, and also as the residence of the borrower was more than five miles distant from their office, the society had exceeded their powers in making the advance, and that therefore the justices had no jurisdiction to deal with the case under the Loan Fund Act; 3, further that they were bound to consider all the facts connected with every loan that came before them, and that, if it appeared that the society had acted contrary to the Loan Fund Act or the rules, the justices were bound to mark the case 'No Jurisdiction,' and accordingly so ruled in the present case." The justices were further of opinion that had they granted a decree they could have allowed costs not exceeding 20*s*., under the Petty Sessions Act. They were further of opinion that the change of the treasurer of the said society did not oust their jurisdiction.

The opinion of the Court was thereupon required as to whether the justices were correct in point of law in their determination of these several points or as to what should be done in the premises.

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The Loan Fund Act (6 & 7 Vict. c. 91) provides:—

Section 9, that, "subject to the restrictions and regulations hereinafter provided," Loan Fund Societies may be formed in Ireland "in any district or place in which it shall be proved to the satisfaction of the said Loan Fund Board that such society is required"; and such society may from time to time raise a stock or fund "for the purpose of granting loans to the industrious classes resident therein, and receiving repayment of the same by instalments," . . . "and it shall and may be lawful for the members of every such society from time to time to make, subject to the restrictions hereinafter contained, rules for the better government and guidance of the same, and for defining the district, by townlands or otherwise, within which the operations of the society ought to be conducted, and for fixing the charges for application papers, instalments, cards, and duplicates, and for the imposition of fines upon the several persons, obtaining loans from the funds of any such society and the officers and members thereof, offending against or violating such rules, and also from time to time to alter and amend such rules as occasion shall require, or to annul and repeal the same, and to make new rules in lieu thereof, so as such rules shall not be repugnant to the laws of this realm, nor to any of the express provisions or regulations of this Act."

Section 14 provides that the rules, when approved of and certified by the secretary of the Loan Fund Board (as provided in sections 12 and 13), shall "be binding on the several members and officers of the said society, and all persons borrowing money therefrom, and all other persons having an interest therein. . . . "

Section 17 provides, *inter alia*, "that, in case the treasurer or any other officer or officers of any loan society shall pay or disburse any sum or sums of money contrary to the provisions of this Act, every person so offending shall for every such offence forfeit and pay a sum of money equal in amount to the sum or sums so illegally paid or disbursed by him as aforesaid, and in addition thereto a sum not exceeding £5, to be recovered as hereinafter mentioned."

Section 24 provides "that it shall not be lawful to and for any such society to make any loan on personal security to any one individual, at any one time, exceeding the sum of £10; and that no second or other loan shall be made to the same individual, or to any person on his behalf or for his use, until the previous loan shall have been repaid."

Section 25 provides that "every note or security to be taken by any loan society established under the provisions of this Act for the repayment of any loan granted by any such society shall be in the form No. 2, in Schedule 'A' hereunto annexed, or to the like effect, and blank forms for such note shall be supplied by the said Loan Fund Board as hereinafter provided; and that no proceedings shall be had or order made for the recovery of any loan fines or interest under this Act, save and except where the note or security for such loan shall be in the form, and on the paper, supplied by the said Board."

Section 26 provides that no loan fund note, bond, or security shall be chargeable with stamp duty.

Section 30 provides "that all notes and securities entered for the payment of such loans shall be made payable to the treasurer or secretary for the time being of the said society; and if the party or parties liable to pay the same shall fail in the payment thereof, or of any of the instalments as agreed to by the terms or conditions of the loan, according to the rules of the society, it shall and may be lawful for any one of Her Majesty's Justices of the Peace, having jurisdiction in the county, riding, city, division, or place, where such party or parties or any one of them so liable shall or may happen to be or reside, or where the office of such society is situated, and such Justice is hereby required, upon complaint made by or on behalf of such treasurer or secretary as aforesaid, to summon the person or persons against whom such complaint shall be made, whether he or they do or do not reside within the jurisdiction of such Justice, to appear either before himself or the Justices assembled at the Petty Sessions, either of the district in which such loan office is situate or of the district wherein the party or any of the parties so summoned reside; and after his, her, or their appearance, or, in default thereof, upon due proof upon oath of such summons having been duly served or left at the ordinary residence of such person, such Justice or Justices shall proceed to hear and determine the said complaint and award such sum to be paid, by the person or persons respectively liable to the payment of any such note or security, to such treasurer or secretary as aforesaid, as shall appear to such Justice or Justices to be due thereon, provided such note or security shall be in the form and on the paper issued by the said Loan Fund Board as aforesaid, but not otherwise, and including all such fines as shall have been incurred under the rules of such society in respect of such note or security, together with such a sum for costs, not exceeding the sum of 2*s.*, as to such Justice or Justices shall seem meet. . . ."

Section 31 provides for the form of the summons to be used "for the recovery of any loan as aforesaid."

Section 33 provides "that it shall and may be lawful for the treasurer or secretary for the time being of any loan society established under this Act to sue for and recover, for the use of such society, the amount of any note or other security which shall have been passed or made payable to the treasurer or secretary for the time being of such society, notwithstanding any change or changes which may have taken place in the person by whom the said office of treasurer or secretary may be filled."

The rules of the Society (certified and approved of as required by the Statute) were annexed to the case. Those material for the purposes of this report are as follows:—

RULE 1. That this Society shall be called the Enniskillen Loan Fund, and its object shall be to grant loans of money to industrious individuals at a

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moderate rate of interest, in the following District, viz.:—The Parishes of Enniskillen, Derryvullen, Cleenish, Devenish, and Trory, such District not to extend more than five miles from the office of the Society.

RULE 14. Applications for loans shall be returned to the Clerk when filled and signed; he shall lay the same before the Committee, and they shall have power to refuse or grant the loan at their discretion: provided always that any previous loan obtained by the Applicant from this Society shall have been wholly repaid, and that any Applicant who may have incurred one, two, or three fines in respect of a previous loan may have the consideration of his application deferred for such time as the Committee may decide; . . . and if three fines have been incurred in respect of the last loan previously granted to him, it shall not be lawful for the Committee to grant such borrower a fresh loan within a period of twelve calendar months from the date of an application for the same, provided that nothing hereinbefore contained shall affect parties who may be enabled to satisfy the Committee that such default or defaults have been occasioned by sickness, or by some unforeseen or inevitable cause, and that in any such case the Committee shall endorse on the Application Paper the grounds for granting such loan.

RULE 17. Two solvent sureties shall become bound with the borrower for the regular repayment of the loan and discount by weekly instalments of one shilling in each pound, by signing, together with the borrower, a promissory note, payable to the Treasurer or Secretary of the Society, for the time being, on demand. Fourpence in the pound of the amount of the promissory note shall be retained at the time the loan is issued, as discount thereon; one penny in the pound on the original sum lent shall be charged as a fine on the borrower for the first default of payment and twopence in the pound for the second default; and such fines shall be paid to the Treasurer in aid of the funds of the Society. Immediately on a second consecutive default occurring, the sureties shall receive notice thereof. Such notice is to be on the form supplied by the Loan Fund Board, and is to be either served personally or left at the residence of the person for whom it is intended. Provided also that it shall be deemed sufficient service of the notice to the sureties of a defaulter to post said notice to the known or ordinary addresses of such sureties through the Post Office, and that proof of such service of such notice shall not be required or necessary for the recovery of loans of this Society in any Court of Law. Should borrowers or sureties neglect to make good the instalments due, together with all fines properly due, they, or any one or more of them, may be immediately sued for the whole amount of the loan remaining unpaid, together with all such fines as aforesaid. Should a borrower again fall into arrear, after having paid up two fines, he will be liable to be again fined, provided always that in no case shall fines exceeding five pence in the pound on the original sum lent be sued for at any one time.

RULE 19. Any borrower obliging this Society to take legal proceedings for the

recovery of a loan shall be thenceforth precluded from obtaining a fresh loan from its funds, unless it shall be satisfactorily proved that he had made every exertion in his power to meet the instalments due. A borrower from this Society shall not be accepted as surety for another until the loan he has received has been repaid, neither shall sureties be accepted as borrowers until the sum for which they are surety shall have been repaid, unless in special cases to be allowed by the Trustees and Committee. Any attempt to impose upon this Society shall preclude the party or parties concerned from receiving any loan or relief from its funds.

Fetherstonhaugh, and *Henry*, *Q.C.*, for the appellant.

Webb, and *Wylie*, *Q.C.*, for the defendants.

The following authorities were cited during the argument: — *Doherty* v. *Travers* (1); *Re Coltman* (2); *Brooks & Co.* v. *Blackburn Benefit Building Society* (3); *Timms* v. *Williams* (4); *Albon* v. *Pyke* (5); *Mayor of London* v. *Cox* (6); *Hardy* v. *Metropolitan Finance Co.* (7); and reference was made to 6 Geo. 4, c. 32, s. 5; 1 & 2 Vict. c. 78, s. 25; 3 & 4 Vict. c. 110, s. 17; 38 & 39 Vict. c. 60.

Cur. adv. vult.

May 14.

GIBSON, J. :—

The summons was brought by Archdeacon Smollen as treasurer, on a note for £10, dated January 30th, 1896, payable on demand. Prior to the hearing he had ceased to hold office, and was succeeded by Alexander Ellis. The note was the last of a series of renewals of an original note given more than seventeen years ago; and the borrower paid for renewals, fines, and interest, the sum of £44. The borrower did not reside within the district of the society. The date and parties to the original note are not stated in the case; but

(1) 31 Ir. L. T. R. 67.
(2) 19 Ch. D. 64.
(3) 9 A. C. 857.
(4) 3 Q. B. 413.
(5) 4 M. & G. 421.
(6) L. R. 2 H. L. 239.
(7) L. R. 7 Ch. 427.

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the borrower was of course one of the makers. It would seem as if one at least of the sureties was new; but the facts are not set out with precision.

Of the several questions of more or less difficulty discussed at the bar, I only propose to give judgment upon two, namely, the powers of the Loan Society under their statutory constitution, and the jurisdiction of the Justices. Both of these subjects depend upon the true construction of the statute 6 & 7 Vict. c. 91.

Under the 9th section any number of persons, *subject to the restrictions and regulations* provided by the Act, were authorized to form themselves into a society in any district or place in which *it should be proved to the satisfaction of the Loan Fund Board* that such society was required; the purpose of such society was for the purpose of granting loans to the industrious classes resident in such district or place; and the society was empowered, subject to the restrictions imposed by the Act, to make rules for defining the district within which its operations *ought* to be conducted. The word "ought," here used, was relied upon by the plaintiff's counsel as conveying that, though the loans of the society would usually be made in the district, there was no statutory prohibition of operations of a more extended character, so that they might lawfully lend all over Ireland. In my opinion, the word "ought" refers to the power of approval entrusted to the Loan Fund Board, and to the statutory restrictions. Until the rules were approved of and certified, the society could not, under section 14, commence operations.

The first rule of the plaintiff society provided that its object was to grant loans to industrious individuals *in*—that must be resident in—a certain specified district. "Object" here is not one of the objects or the main object. It must be "the object" of the society.

Having regard to the statute and this rule, would a loan to persons residing outside the district be *ultra vires?* The society came into being as a quasi-corporation for a specific and limited object, and its powers and sphere of action depend upon its rules. Such rules, sanctioned by the Board, are like the statutory memorandum under the Companies Acts, the effect of which was decided

in the *Ashbury Railway Carriage Company* v. *Riche* (1). It was there laid down that a statutory corporation created by Act of Parliament for a particular purpose is limited as to all its powers by the purposes of its incorporation as defined in that Act. The principle is not limited to companies under the Companies Act of 1862, but is of universal application: *Wenlock* v. *River Dee Co.* (2). All building and friendly societies fall within the rule, and I have no doubt that this Society cannot lawfully extend its operations beyond what its rules authorize. Such rules must be regarded as its memorandum of association or charter, and, unless contrary to the statute, are binding upon the Society for all purposes.

If the loan was made to a person outside the district, it would therefore *prima facie* be invalid as a statutory loan, though, where the borrower obtained such loan by misrepresentation of residence, he might possibly be estopped from making such a defence. I express no opinion as to the right of the Society, in case of a loan made *ultra vires*, to recover the amount from the borrower in an action. It may be that the amount is recoverable on the principle laid down in *Re Coltman* (3) and in the *Blackburn Case* (4). There may be however a difficulty from the note being unstamped, as section 26 may not apply to a transaction *ultra vires*. The point was not argued, and it is best to leave it for future decision.

The next question is the jurisdiction of the justices. Section 24 prohibits loans of over £10. Section 25 prescribes the form of note which must be on paper supplied by the Board. Section 26 exonerates from stamp duty notes and documents in pursuance of the rules of the society or the Act. Section 30 confers jurisdiction on justices. It requires notes for the payment of "such loans" to be made payable to the treasurer or the secretary for the time being, who, according to the form in the schedule, must be a named person; and if the party or parties liable fail in payment according to the rules, any Justice of the Peace having jurisdiction where the party or parties liable or any of them shall happen to be or reside, or where the office of the society is situate, on complaint of the treasurer or secretary, is to summon such person or persons, and, after appearance or proof of service,

(1) L. R. 7 H. L. 653.
(2) 10 App. Cas. 354.
(3) 19 Ch. D. 64.
(4) 9 App. Cas. 857.

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proceed to hear and determine the complaint, provided the note is in the prescribed form and on the prescribed paper. The costs are fixed at two shillings. Section 31 provides for special forms, procedure, and fees. Section 32 authorises execution, and exempts from auction duty; and section 33 enables the treasurer and secretary for the time being to sue notwithstanding a change of officers, a power which such officer would not possess at Common Law.

The above provisions resemble the Statute 5 & 6 Wm. 4, c. 23, which used to regulate similar societies in England, and on which there have been decisions which raise a serious question whether the summary procedure before justices, authorised to be taken by the treasurer and secretary, who would have no common law right to sue, is not exclusive. Such was the view taken by the Queen's Bench in *Timms* v. *Williams* (1), where an action by the treasurer was held not to be maintainable. Where, however, an action was brought by the trustees, it was held that such action lay: *Albon* v. *Pyke* (2). But the grounds of decision there were special, the pleading not alleging that the note was for a statutory loan. An argument in favour of the application of *Timms' Case* (1) to the 6 & 7 Vict. c. 91, is afforded by the previous repealed Irish Statutes, 4 Geo. 4, c. 32, section 5, expressly authorising proceeding by civil bill, and 1 & 2 Vict. c. 78, section 25, action in the name of the secretary. The English statute 3 & 4 Vict. c. 110, section 17, enabled the secretary to sue in the County Court. The omission of any similar provisions from the Act 6 & 7 Vict. c. 91, is noticeable. *Timms' Case* (1) was decided in the year 1842.

Whether the trustees could maintain an action or not under section 18, the treasurer can only sue in respect of a statutory loan; and, if *Timms' Case* (1) is rightly decided, he must proceed before justices. The point was not taken in *Doherty* v. *Travers* (3), where the civil bill was heard and dismissed on the merits.

The justices had jurisdiction to inquire into the complaint, which was regular on its face; but, when it appeared that it was outside their jurisdiction, the case should have been dismissed

(1) 3 Q. B. 413. (2) 4 M. & G. 421. (3) 31 I. L. T. R. 67.

without prejudice, with costs. There was jurisdiction to dismiss but not to grant the application. So the Land Commission, where an alleged tenant seeks to fix a fair rent, may refuse the application with costs, where there is no tenancy, though the fact that there was no tenancy would preclude them from giving a valid decision in his favour: see *O'Keefe* v. *Dunne* (1).

Whether a loan made to a borrower within the district, contrary to other provisions of the Act or rules—if there was no question of estoppel—would be beyond the justices' jurisdiction in a proceeding taken by the treasurer, or whether the objection ought to be relied upon as a defence on the merits, is a matter on which I abstain from indicating any opinion: *Mayor of London* v. *Cox* (2); *Ashbury Case* (3).

The action of the society suggests hosts of difficulties. Having regard to section 27, Is a renewal lawful? Can a new treasurer take and sue on a renewal in respect of a loan made in the time of a former treasurer to whom the original note was passed? What interest, if any, is to be charged on renewal? Can new sureties be inserted in a renewal note? Must the borrower reside in the district throughout? What is the effect of the borrower having ceased to reside within the district at the time of renewal, or of such borrower being within the district when the renewal was made, if the original loan was made when he was outside such district?

Without deciding these questions, I am of opinion that what the statute contemplates is lending within a limited area, where the circumstances of the borrowers would be known to the lenders; and the statute provides special cheap machinery for the recovery of such loans. The summary jurisdiction created is restricted to authorised advances. The loan here was apparently made when the borrower was not residing within the district. The treasurer cannot therefore use the summary procedure for the purpose of enforcing payment. The order below was substantially right, though the justices ought to have dismissed the application without prejudice with costs.

(1) 28 I. L. T. R. 116. (2) L. R. 2 H. L. at p. 284. (3) L. R. 7 H. L. at p. 673.

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HOLMES, J. :—

I concur. It is clear that the 30th section of the statute does not give jurisdiction to the justices in every case in which it is alleged that a loan has been made by a loan society on a note or other security. Mr. Henry admitted that it was necessary that the note or security should be in the form and on the paper supplied by the Loan Fund Board. I pointed out that, at the least, it was also necessary to show that the loan society had been duly established and was entitled to all the benefits of the Act. During the argument I was disposed to think that where these two circumstances existed, the justices would have jurisdiction, not only to enter on the inquiry but also to decide all matters in controversy. Further consideration has satisfied me that there is a third condition of jurisdiction. Not only must the loan society be duly constituted, but the defendant must be a person to whom such society was authorised to lend. In other words, the loan must be one which in some conceivable state of circumstances the society would have had authority to make. I am of opinion that, if the three conditions I have mentioned are fulfilled, the justices are empowered to determine whether the alleged loan was made in point of fact, and if so to adjudicate upon all matters of defence. The conditions however, have not been fulfilled in the present case. The ninth section, which is the foundation of the existence of a loan society, enacts that it shall be lawful to form the society in a certain district or place, and for the society so formed to raise a fund for the purpose of granting loans to the industrious classes resident therein. No other authority to lend is conferred by the Legislature; and, once it was ascertained that the defendant was not resident in the district at the time of the loan, the case was no more within the jurisdiction of the justices than it would have been if it had been shown that the society which purported to make the loan had never been duly established under the Act.

I wish to add that I do not decide that a loan made by a loan society to a person not resident in its district is irrecoverable. An unauthorised loan is not necessarily illegal; and there are Courts having jurisdiction to determine whether and by whom it can be

sued for, either on the notes or as money lent; but the Court of Petty Sessions is not one of them.

O'BRIEN, J.:—

I entertain a different view, and must confess that I have not wavered from the opinion that has formed itself in my mind, with the conviction of certainty, from an early period of the argument. It appears to me that clearly the jurisdiction of the magistrates did exist, and that they were bound to grant the decree, there being no valid reason shown to the contrary. My only difficulty arises upon the decision of Mr. Justice Holmes in the case which came before him on appeal from the decision of His Honour Judge Webb (1), where, though other contentions were raised, the judgment rested upon one branch of the objections only, namely, the question whether a renewal note of this kind constitutes a fresh advance leaving the old debt unpaid, and is therefore not recoverable. The case before Judge Webb was that of a loan of £9, of which subsequently £3 was paid on foot of instalments due, leaving £6 still outstanding. In that state of facts the Loan Fund Society made a new loan for the total sum of £10, £4 of which was a new advance, the balance being made up of the £6 still owing on the original note. In that case there was therefore an entirely fresh advance of £4 which may distinguish it from cases where the new note is given for precisely the amount due on the original security. However, I entertain no doubt whatever that both renewals would be subject to the same infirmity, and equally within the rule forbidding a further advance while a former debt was still outstanding. For, though at Common Law, the taking of a new security extinguishes the old debt, yet this would not be payment within the meaning of the rule now under consideration and the Act of Parliament. It is accord and satisfaction; but, although they rest on the same principles, accord and satisfaction is not necessarily payment. The Act of Parliament was intended to provide against waste of the funds of the society; its object was the relief of industrious persons who from some temporary causes might be in want; and the enactment is

(1) *Doherty* v. *Travers*, 31 I. L. T. R. 67.

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express that no new loan shall be made until any previous advance to the same person had been discharged and satisfied by payment, that is, by payment properly so called.

I have therefore come to the conclusion that the renewal note was unauthorised by the Act of Parliament; but it is a different question whether it was illegal, and whether there was or was not a means of enforcing payment. But the ground upon which Judge Webb refused to make a decree is not the same as the ground of objection to which the consideration of the Court has been mainly directed in the present case. The judgment of the majority of the Court rests on the ground that the area within which the Loan Society should act did not comprise the residence of the person to whom the money was advanced. It is possible that the question may come again under review on some future occasion, for it is one of no small importance, there being large sums outstanding in various parts of Ireland due to societies like the present. The decision of this Court, however, even if it extinguished them, or resulted in the imposition of a serious restriction upon their operations, will not, I consider, cause any grave loss to the community, for to my knowledge the central authority has been on several occasions called upon to intervene in the affairs of these local bodies, and has not unfrequently found much abuse existing.

The statute (6 & 7 Vict. c. 91) gives power to make certain rules, amongst other things, defining the area within which the operations of the Society ought to be conducted. Mr. Justice Gibson has admitted that, if a person living outside that area came to the office of the Society, and stated that he was living within the district, he might be estopped from denying that this was so. It seems to me that, by the payment and receipt of the money, the borrower is conclusively estopped from relying on his non-residence as a defence. Some confusion has been introduced by the attempt to draw an analogy from statutes creating taxing powers within a certain area. That seems to me to be quite a different matter. The case before us is one where a man borrows money, and the question is, Can he afterwards plead that though he has received the money, there was no authority to make him the loan, and that he is not liable to repay it? I apprehend that

there is no parallel to be found in English law for such a proposition—that he may not altogether refuse to pay, but refuse to be compelled by a Court of Petty Sessions. If he be right in that contention, he is free from liability, for it seems to me that no action can be brought in the superior Courts to recover the amount of the debt.

The Loan Fund Act was passed to confer certain rights and powers upon these local societies; they can raise money on debentures for working capital; they are given power to use a certain form of promissory note which is free from stamp duty. These notes are made payable to the treasurer or secretary of the society, who is a transitory officer. It seems from *Timms' Case* (1) that a note made to the treasurer of the Loan Society cannot be sued for at common law at all; and on principle it is hard to see how it could be otherwise; a promissory note is a negotiable security; here the transitory officer of the local body has no power to endorse or assign the note, and therefore it is necessary that the statute should confer a power to sue in the name of the officer for the time being. Archdeacon Smollen has ceased to act as local treasurer, and has severed his connection with the Society altogether. As the note is in the statutory form, and is made payable to Archdeacon Smollen as the treasurer for the time being, the present treasurer cannot recover at common law, because he is not the person to whom the note is made payable. We must, therefore, in my opinion, start with this fact that, if the debt is not recoverable under the provisions of the Act of 1843, it is lost—lost by what? By the refusal of the borrower to make repayment. Is that possible? The Loan Society is given authority to define the district in which their operations ought to be conducted. If they violate the general policy laid down in the Act of Parliament or their duty thereunder, they are answerable to a central board of control in Dublin. This is therefore not the case of a statutory enactment defining a taxable area, nor yet is it the case of a charitable institution the objects of which are restricted to a particular place. It is the case of a person within a certain area entering into a contract

(1) 3 Q. B. 413.

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in his own name to repay the amount of an advance to him; and the provision of the Act of Parliament is expressed in general terms to the effect that the promissory notes given as security for such advances may be sued upon in the Petty Sessions Court, the requisite conditions of proof, as laid down in the Act itself, being that the borrower shall be held liable upon production of the note in the prescribed form—a form of a simple character intended to prevent any difficulty or abuse of power in dealings with persons who might not be able to understand a document of a more complicated nature. There are many statutes which declare in terms that "it shall not be lawful" to do certain things. Over and over again the tribunals of this country have had occasion to criticise erroneous constructions placed on these words in our Irish Land Code, and to impress on transactions so forbidden the character of illegality. But there is no such express prohibition in the clause dealing with and limiting the area of the operations of these societies, as is found in the enactments to which I have referred, or as is contained in the provisions of this Act as to making a new loan while an old debt still remains unpaid.

There is an authority which to my mind is quite decisive on the question now under discussion—*Coltman* v. *Coltman* (1)—which went on appeal from Lord Justice Fry to the Court of Appeal. Every argument that has been presented here is met by that case. The marginal note in that case is as follows. [His Lordship read the marginal note, and continued]—There is no difference I apprehend in the position of the trustees of such friendly society and the officer of a local Loan Fund under 6 & 7 Vict. c. 91. Lord Justice Fry, in giving judgment, says:—"It is not in dispute that such a lending was beyond the powers of the trustees of the society, but nevertheless they are seeking to recover against the intestate's estate upon the promissory note so given by him. The question which has been argued before me is this: Was that loan an act merely beyond the powers of the trustees, or was it one which is unlawful and prohibited by statute?" He then refers to the Act regulating these Friendly Societies (38 & 39

(1) 19 Ch. D. 64.

Vict. cap. 60), and continues:—"Section 18 provides with respect to loans to members of registered societies, that the society may lend in a particular manner to particular members. In terms therefore the loan in question is prohibited by the statute, and it is very difficult, in my opinion, to draw any distinction between cases of express prohibition by reference to the motive with which the prohibition may have been imposed by Parliament. In the next place, it appears to me that if I regard the object of the society, that object is inconsistent with loans to persons other than members." Then, after reviewing the earlier statutes on the subject, he says:—"It appears to me, therefore, that I must come to the conclusion, that the Legislature has for a fixed purpose and design confined the loans to be made by these societies to the members of the societies; and that therefore a loan made to a person other than a member is a direct violation of the objects of these societies, and of the express statutory provision in force in regard to them. I think, therefore, that the transaction was one which is illegal, and therefore one on which no action can be maintained." He then refers to and endeavours to distinguish the case of *Hardy* v. *Metropolitan and Finance Co.* (1)—a case which goes entirely in the same direction—where relief had been given by the Court of Appeal to a friendly society as against a person who had borrowed money from the society in violation of their rules. On appeal, when Jessel, M.R., came to deal with the extraordinary result flowing from this decision—that a man who receives money from another, who is only authorised to lend under certain conditions, can be allowed afterwards to say that those conditions did not exist—he disposes of it in this summary manner. "I am unable," he says, "to arrive at the conclusion at which" the learned Judge in the Court below "arrived. The claim is on a promissory note, payable by three persons jointly and severally to three persons as individuals. There is no dispute that the consideration was paid and that the note is unpaid. One of the three makers has died, and it being a joint and several note a proof was asked to be admitted against his estate. That proof has been rejected upon this ground, that the money

(1) L. R. 7 Ch. 427.

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advanced was money belonging to a friendly society; that the lenders were the trustees of that society; that the Friendly Societies Act (38 & 39 Vict. cap. 60) makes a lending of money on a personal security to persons not members of the society an illegal act, and consequently that the trustees are not entitled to recover this money as against the estate of the maker who had died. Now it appears to me that there is nothing in the Act to make the contract illegal. The Act says the trustees, with the consent of the committee of management, or a majority of the members of the society, may lend the money of the society on certain securities, not including personal securities; but there is nothing in the Act which directly or indirectly prohibits the lending on personal security beyond the fact that it gives the trustees no authority to do so, and that their doing so would therefore be a breach of trust. I cannot find anything in the Act which would prevent all the members from effectually authorizing a loan on such security, though a mere majority could not do so. There is therefore nothing that I can find in the Act of Parliament which makes the loan illegal, and it seems to me that the ground for the decision fails."

"I am not satisfied," he continues, "that an express provision in the Act of Parliament that the trustees should not lend money upon personal security would have made any difference. The loan would have been wrong, it would have been an appropriation of the society's money to their own use; but there would not have been any such illegality in the transaction as would preclude the trustees from recovering the money lent. It seems to me that to hold it to be incompetent to maintain an action under these circumstances would be to say that it was incompetent for a trustee who had improperly appropriated the money of the society, and lent it in his own name, to take steps to enable him to recover it. How the persons who borrowed it—there being no illegality in the borrowing on their part, and no illegality in their agreeing to repay the money so borrowed, and no illegality in the purpose to which they were intending to apply it—can set up the doctrine that they are relieved from their liability by reason of the money having originally belonged to a friendly society, is a thing which I am quite unable to understand."

Brett, L.J., and Lindley, L.J., concurred in this view, and both expressed the same degree of surprise at the decision of the Court of first instance.

It appears to me that this case is a direct authority on the question before us. The Legislature, when providing for the limitation of the district within which such a loan society as the present was to conduct its operations, has expressed its intention with exactness; the words express clearly what was in the mind of the Legislature; and besides, while jurisdiction is given to the Court of Petty Sessions, so as to provide an inexpensive tribunal and not burthen poor persons with costs, the jurisdiction is given, under section 30, to the Justices of the Petty Sessions, either of the district where the loan office is situate, or where the debtor resides, to dispose of the summons. It seems to me impossible to suppose that where a person comes into the loan office at Enniskillen and obtains a loan, and signs a note to secure its repayment, he can afterwards, though the Act provides that he may be sued in any Petty Sessions Court in Ireland for the debt, be permitted to suggest that he is in the position of a person on whom some local drainage tax has been imposed, and is not liable to repay the amount which he has borrowed.

SIR P. O'BRIEN, L. C. J.:—

Several questions of considerable importance were raised before the magistrates in this case. Substantially but one was discussed before us—one no doubt of very considerable importance in reference to the administration of Loan Fund Societies. That question was whether, when a loan is made by the Society to a borrower who resides without the district defined by the rules of the Society as the area in which its operations are to be carried on, the magistrates have jurisdiction to entertain a complaint made on summons to enforce payment of the loan. It is admitted that the borrower resides outside the prescribed district; there is no question about the fact; what then is the law? The magistrates have held that they had no jurisdiction under the circumstances to entertain the complaint, and we think they were right. The constitution and authority of Loan Fund Societies are determined by the 6 & 7 Vict. c. 91, and the rules made in pursuance thereof. The 9th section of the Act provides that it shall and may be

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lawful for any number of persons, subject to the restrictions and regulations thereinafter mentioned, to form themselves into a society in Ireland in any district or place in which it shall be proved to the satisfaction of the Loan Fund Board that such society is required; and such society shall and may raise from time to time by loans from members of such society or other persons . . . a stock or fund for the purpose of granting loans to the industrious classes therein and receiving payment of same by instalments. It is obvious from so much of the statute as I have read that the object and intent of the Legislature was to confer upon the Loan Fund Societies an authority to lend to residents within a district and to receive payment from such individuals. Loan Fund Societies are the creatures of statute, and the language of the statute as to whom they should lend to, as to who should be borrowers, is in my opinion absolutely plain—namely, residents within the prescribed district. Later on in the section it is provided that it shall and may be lawful for the members of every such society, subject to certain restrictions, to make rules for the better government and guidance of the same, and for defining the district within which the operations of the society ought to be conducted. It has been argued that the expression "*ought* to be conducted" implies a discretion, so to speak, to travel outside the district, in other words that it is not imperative to confine all transactions within the district. I cannot accept this contention. The word "ought," in my judgment, merely refers to the future determination of an approximate district by the members of the society; but, once the district is determined, it is I think plain from the earlier words of the 9th section of the statute that all transactions must be confined to this district—to residents within that district loans are to be made, and from them payment is to be received. Here the rules made by this Society prescribe a certain district, and to permit the assumption of an authority to conduct operations outside the limits of the district would in my opinion be to act in opposition to the object and intent of the statute.

The provisions of the 14th section of the Act are to be borne in mind—that it shall and may be lawful for every Loan Society to commence operations on receipt of a transcript of the rules, properly certified, but not before; and the section, amongst other

things, further directs that copies of the rules and all alterations of them shall be lodged with the Clerk of each Petty Sessions in the district within which the operations of such society are to be conducted. The receipt of a properly certified transcript of the rules is a condition precedent to their right to commence operations. These rules prescribe that their operations are to be carried on in a certain district. They have admittedly carried on operations outside that district, and an authority to carry on operations within a prescribed district would seem to me to imply a prohibition to travel outside that district. Moreover the direction to lodge the certified copy with the Clerk of each Petty Sessions within the district within which such operations are to be conducted is, I think, a plain intimation that the sphere of the operations of the society and the limits of the jurisdiction of the magistrates are coterminous.

The 30th section is the one which provides for proceedings before the magistrates. It says that all notes and securities entered into for the payment of such loans shall be made payable to the treasurer or secretary for the time being of such society; and if the party or parties liable to pay same shall fail in the payment thereof or of any instalments as agreed to by the terms of the conditions of the loans according to the rules of the society, it shall and may be lawful for Justices of the Peace to summon the person making default and enforce payment. But, in my opinion, the defendants here, being resident without the prescribed district, had not the status of and were not parties within the meaning of the section; and once that appeared it became manifest the magistrates had no jurisdiction. In my opinion their ruling upon that point was right, and must be affirmed.

I do not decide that no other tribunal has power to enforce payment of this loan, but, before any such decision is come to, *Timms* v. *Williams* (1) must be considered, as well as *In re Coltman* (2), and regard must also be had to the effect of the 26th section of the Act which grants immunity from stamp duty to any note or security made pursuant to the provisions of the statute.

Solicitor for appellant: *C. Falls.*

Solicitor for defendents: *P. Maguire.*

A. E. R. J.

(1) 3 Q.B. 413. (2) 19 Ch. D. 64.

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REG. (DONOHUE) *v.* JUSTICES OF ARMAGH (1).

Licensing law—Spirit-grocer's licence—Certificate of Justices—"Person dealing in or selling tea, cocoa nuts, chocolate, or pepper"—Licensing Act, 1872 (35 & 36 *Vict. c.* 94), *ss.* 81, 82—*Licensing Act,* 1874 (37 & 38 *Vict. c.* 69), *ss.* 9, 10.

It is not competent for Justices at Petty Sessions to refuse to grant a certificate for a spirit-grocer's licence on the ground that the applicant was not, at the date of the application, a person "dealing in or selling tea, cocoa nuts, chocolate, or pepper," it being for the Excise to ascertain the existence of this qualification when issuing the licence.

The decision on this point in *Reg.* (*Gilbey*) v. *Justices of Fermanagh* ([1897] 2 Ir. R. 559) reconsidered and affirmed.

CERTIORARI.

The applicant, Donohue, had applied to the Justices of Armagh, sitting at Portadown, for the requisite certificate to enable him to obtain from the Excise a spirit grocer's licence. The bench was composed of ten Justices. The applicant was examined and proved the necessary notices, &c. The officer of police stated that he had no objection on either of the statutory grounds. Mr. T. Harrison, B.L., who appeared for two inhabitants, was allowed by a majority of the bench to intervene "as *amicus curiae*," and argued that it was competent to the Justices to investigate the character of the applicant, and the suitability of the premises—the applicant's solicitor objecting and citing *Reg.* (*Marshall*) v. *Justices of Tyrone* (2) and *Reg.* (*Morgan*) v. *Justices of Armagh* (3). The applicant was recalled and examined by some of the Justices, who questioned him solely as to the suitability of the premises. The Justices retired, and after deliberation returned, when the chairman announced that the majority had refused the application. The applicant's solicitor asked were any grounds given. The chairman said he was not instructed to state any grounds. The following was the certificate of the order made:—"I certify that,

(1) Before PALLES, C.B., and MURPHY, ANDREWS, and BOYD, JJ.
(2) [1896] 2 Ir. R. 16. (3) *Ibid.* 318.

upon hearing an application of Peter Donohue, of Market-street, Portadown, for a certificate to enable him to obtain a spirit grocer's licence for the premises situate in Market-street, Portadown, lately used as a post-office, an order was made on the 27th September, 1897, by the Justices present, to the following effect, viz.:—"The applicant Peter Donohue, having been duly sworn and examined by Mr. A. T. Farrell, solicitor for the applicant, and having testified that he was tenant of said premises situate at Market-street, Portadown, being the premises lately occupied by the post-office authorities, and further examined as to the suitability of said premises, and the district inspector of the Royal Irish Constabulary being present, and (having been asked by the Court) stating he had no objection to the character of the applicant or to the suitability of the premises, the majority of the magistrates, on deliberating, refused the application for a certificate, and declined to give any reason therefor, . . . (four Justices) dissenting."

One Justice showed cause on his own behalf. In the affidavit filed as cause, he stated that he, in common with the majority of the magistrates, thought that some positive evidence should be given on the matters to be certified to; that "in addition to this," he, "and many of the magistrates who" resided in or around Portadown, were not satisfied as to the suitability of the premises, and that some "had no knowledge of" many material facts. He referred to certain circumstances of alleged unsuitability, stating that he thought then, and still thought, that these were grounds of unsuitability, adding that he knew that "many of the magistrates were not satisfied as to the suitability of the premises, and therefore declined to grant the certificate." In refusing to grant the certificate he stated that he had acted *bona fide*, and in the exercise of what he considered to be a judicial discretion.

J. H. Campbell, Q.C. (*J. Chambers* with him), for the applicant, now moved to make absolute a conditional order for writs of *certiorari* and *mandamus*. The order was bad on its face as not showing the ground of refusal. Only one of the bench had shown cause, and his affidavit merely suggested that the ground of refusal in the mind of *some* of the Justices was unsuitability. But

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this was not open, as there was no objection by the officer of police. [He relied upon *Reg.* (*Marshall*) v. *Justices of County Tyrone* (1), and *Reg.* (*Morgan*) v. *Justices of County Armagh* (2).]

T. M. Healy and *Megaw*, for the Justice, showing cause, relied on the fact that it was not shown that the applicant was, at the time of the application to the Sessions, a person dealing in tea, &c., within section 82 of the Licensing Act of 1872. *Reg.* (*Gilbey*) v. *Justices of County Fermanagh* (3) was (they argued) decided on the ground of non-residence.

Chambers, in reply:—

No such question was raised at the Sessions, and there is no evidence that the man was not a grocer. From a consideration of the statutes from 6 Geo. 4, cap. 25, onwards, it is evident that it was the duty of the Excise to see (while the coffee licence was in force) that the applicant had paid his coffee licence, and after 1869, when that licence was abolished (see 32 & 33 Vict. c. 4), to see that he dealt in "tea, coffee, cocoa nuts, chocolate, or pepper." After 1869 a person "dealing in" these articles was put in the same position as if he had been licensed under the previous Acts for retailing these groceries. It was therefore still for the Excise to see that he did deal in coffee, &c. The Licensing Acts, 1872 and 1874, did not alter this further than to leave "coffee" out of the enumeration; and accordingly the Justices could not enter on the question; they could only entertain an objection by the police as to character and suitability of premises. The point was expressly decided in this Court, as well by the Lord Chief Justice as by Gibson, J., in *Reg.* (*Gilbey*) v. *Justices of Fermanagh* (3).

PALLES, C.B.:—

My view of this case—which has been extremely well argued—can be expressed in a few words. Under the Act of 1825 (4), and until the Act of 1869 (5), any person who had previously obtained an Excise licence for the sale of "coffee, tea, cocoa nuts, chocolate, or pepper," could obtain a spirit grocer's licence. The Excise

(1) [1896] 2 Ir. R. 16. (2) *Ibid.* 318. (3) [1897] 2 Ir. R. 559.
(4) 6 Geo. 4, c. 81. (5) 32 & 33 Vict. c. 14.

authorities, when granting the first licence, which I shall call the "grocer's ordinary licence," had not power to make any enquiry whatsoever. When granting the second licence, viz. the "spirit grocer's licence," they were entitled and bound to ascertain the valuation or rating of the premises for the purpose of assessing the duty to be paid for it; but they had not power to make any other enquiry.

Thus the law stood until 1869, when the duty on the "grocer's ordinary licence" was repealed; but the statute of that year enacted that any person who dealt in the classes of commodities which had formerly been subject to such last mentioned licence, should have the same rights as if he held such a licence. From this date therefore it was necessary, in order to obtain a "spirit grocer's licence," that the applicant should be a person who dealt in groceries, or in some of the specified grocery goods; and the only tribunal that could determine, as preliminary to granting the spirit grocer's licence, whether the applicant was a dealer in these articles, must have been the Excise authorities.

This was the state of the law until 1872. The 81st and 82nd sections of the Licensing Act of that year (1) imposed upon certain classes of grocers desirous of obtaining "spirit-grocers' licences," the obligation of procuring a magistrates' certificate as to the character of the applicant and the manner in which his business had been conducted during the preceding year, but those classes of persons did not include a person who had not previously been licensed as a spirit grocer.

Therefore, after the Act of 1872, it continued to be the law that, in reference to such an application as the present, the Excise officer was the person authorised to make the preliminary enquiry whether the applicant dealt in the specified groceries, and his determination must necessarily have had reference to the time of the application for the Excise licence. Then came the Act of 1874, but it did no more than throw upon an applicant who had not been previously licensed as a spirit grocer the obligation of obtaining from the magistrates a certificate as to his character and the suitability of the premises. No doubt he continued to be under his former obligation of being at the time he applied for the

(1) 35 & 36 Vict. cap. 94.

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licence a person who dealt in the specified groceries or some of them, and of satisfying the Excise authorities of that fact; but in my opinion, the Act of 1874 did not change the persons who, under the previous statutes, were to determine that question. That question must, I think, still be dealt with by the Excise authorities, and the jurisdiction of the Justices is limited to enquiring into the applicant's character and the suitability of the premises. It does not, in my opinion, extend to the fact of the applicant dealing in groceries. This being so, *Reg.* (*Morgan*) v. *Justices of Co. Armagh* (1) and *Reg.* (*Marshall*) v. *Justices of Co. Tyrone* (2) rule the present application, and the conditional order must be made absolute.

ANDREWS, MURPHY, and BOYD, JJ., concurred.

Solicitor for the applicant: *A. T. Farrell.*

Solicitor for the respondent: *J. Boyle.*

A. E. R. J.

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JOHNSON (FALSELY CALLED COOKE) *v.* COOKE (3).

Petition for declaration of nullity of marriage celebrated in India—Respondent domiciled and resident in Ireland—Jurisdiction.

A, a domiciled Irishman, intermarried in Ireland with B, and afterwards, during B's lifetime, went through the ceremony of marriage, according to the rites of the Church of England, with C at Kashmir, in India. C presented a petition to have the marriage in India declared null and void, and the citation was served upon A at his residence in Dublin. The petition contained no allegation relating to the domicil of the petitioner then resident in England. The respondent did not appear.

Held, that the respondent's domicil and residence in Ireland gave the Court jurisdiction, and (the facts having been proved) the marriage in India was accordingly declared null and void.

TRIAL OF CAUSE.

This cause was commenced by a petition filed on the 18th September, 1897, by Theresa St. Josephine Johnson, spinster, then residing at No. 83, Abingdon Villas, Earl's Court Road, Kensington, London, to have her marriage, which was celebrated

(1) [1896] 2 Ir. R. 818. (2) *Ibid.* 16. (3) Before MADDEN, J.

in India with John Cooke, now residing at No. 4, Belton-terrace, Dolphin's-barn, Dublin, declared null and void.

The material facts were stated in the petition, which was as follows:—

1. That on the 6th day of August, 1868, at the Parish Church of Monkstown, in the county of Dublin, John Cooke (then a lieutenant in the 3rd Hussars) was lawfully married, according to the rites and ceremonies of the then United Church of England and Ireland, by the Rev. John Lynch, Clerk in Holy Orders, to Caroline Olivia Cavendish Cooke, then Caroline Olivia Cavendish Palmer, spinster, daughter of Captain Roger Palmer, then residing at No. 19, Clarinda Park, East, Kingstown, in the said county.

2. That on the 3rd day of September, 1887, at the English Church of Shiegh Bagh, at Srinagar, in Kashmir, in India, a ceremony of marriage, according to the rites and ceremonies of the Church of England, took place between your petitioner and the said John Cooke, who is a son of John Cooke, of Kiltinane Castle, Fethard, in the county of Tipperary, Esquire, deceased. He (the said first mentioned John Cooke) was then paymaster (retired major) in the 6th Dragoon Guards (Carabineers), and formerly resided at Kingstown aforesaid.

3. That prior to the said ceremony of marriage with your petitioner, who was then only sixteen years of age, the said John Cooke falsely represented that his former wife was dead. From the said 3rd day of September, 1887, until October, 1889, your petitioner lived and cohabited with the said John Cooke at divers places in India.

4. That on and after the 3rd day of September, 1887, when the said ceremony of marriage took place between your petitioner and the said John Cooke, the said Caroline Olivia Cavendish Cooke was (and she is now) alive, and the said marriage of her with the said John Cooke was then (and is now) in force and effect, and in nowise annulled, dissolved, or abrogated.

The respondent was served personally with the citation and notice of all proceedings in the cause, but did not appear.

By an order of Andrews, J., dated the 29th November, 1897, the cause was directed to be set down for trial before a Judge

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without a jury, and the questions to be tried were set out as follows :—

(1.) Whether this Court has jurisdiction to grant to the petitioner the relief sought by her in this cause; that relief being for a decree of nullity of her marriage with the respondent in India on the grounds of his previous marriage with another woman, still alive, and it not being stated that the petitioner has an Irish domicil, and, if so;

(2.) Was the respondent lawfully married at Monkstown Parish Church, in the county of Dublin, to Caroline Olivia Cavendish Cooke (formerly Palmer) on or about the 6th August, 1868?

(3.) Did the respondent go through a ceremony of marriage with the petitioner at Srinagar, in Kashmir, in India, on or about the 3rd September, 1887?

(4.) Was Caroline Olivia Cavendish Cooke (formerly Palmer) alive on and after the date of the marriage ceremony at Srinagar?

The petitioner was examined in Court. She deposed to the facts in the petition; stated she was born in India of English parents, and resided there; and identified the signature and handwriting of the respondent in the original register-book containing the Monkstown marriage, and in certain letters (all produced). Mr. Roger Palmer also identified this signature and handwriting, and proved that his sister (Mrs. Cooke) was still alive. Mr. Phillips proved that the respondent, when being served, admitted that his first wife was alive when he married in India. The Indian ceremony of marriage was proved by the production of the licence of the Bishop of Lahore, and of a certified copy (sealed by the Under Secretary of State for India) of the original register (*Ratcliffe* v. *Ratcliffe* (1); 14 & 15 Vict. c. 40, ss. 21, 22, and c. 99, s 14).

Matthew J. Bourke, Q.C., and *H. B. Colthurst*, for the petitioner :—

The respondent resides in Ireland, and is domiciled there. This is what determines jurisdiction and confers it on the Court : —Shelford on Marriage, p. 486; 3 Burn's Ecclesiastical Law,

(1) 1 S. & T. 467.

p. 250; Statute of Citations (23 Hen. 8, c. 9); Westlake's Private International Law, 2nd edition (1880), sect. 41 (p. 75), sect. 45 (p. 78), *Errata*, p. xxvi.; *Williams* v. *Dormer* (1); *Yelverton* v. *Yelverton* (2).

This principle is not inconsistent with the decisions in *Simonin* v. *Mallac* (3), and *Sottomayor* v. *De Barros* (4).

The jurisdiction of the Court is not exclusively confined to marriages which are celebrated in Ireland. The Court has jurisdiction over any person who has by his conduct precluded himself from objecting to such jurisdiction:—Dicey's Conflict of Laws (1896), pp. 394, 223; *Ruding* v. *Smith* (5); *Kent* v. *Burgess* (6).

The petitioner by the very act of petition, and the respondent by appearing without protest, or by not appearing at all, submit to the jurisdiction of the Court: Order LXX., Rules 30, 31: *Sinclair* v. *Sinclair* (7). The petitioner relies on the maxim *Actor sequitur forum rei* (Branch. Max., 4th ed., 1822, p. 4).

Cur. adv. vult.

Dec. 21.

MADDEN, J., held that the Court had jurisdiction to grant the relief sought, the respondent being domiciled in Ireland, and that the facts necessary to support the petitioner's case were proved.

He accordingly made a decree declaring the Indian marriage null and void, and ordered the respondent to pay the petitioner's costs (8).

(1) 2 Robertson, 505.
(2) 1 S. & T. 574.
(3) 2 S. & T. 67. [94.
(4) 2 P. D. 81; 3 P. D. 1; 5 P. D.
(5) 2 Hagg. Const. 371.
(6) 11 Sim. 361.
(7) [1896] 1 Ir. R. 603, 608.
(8) The decree was as follows:—

"The Judge having taken the oral evidence of Theresa St. Josephine Johnson, Roger Palmer, George A. Phillips, and the Rev. James Goldsmith, the witnesses produced on behalf of the said petitioner in support of the petition filed in this cause on the 18th of September, 1897, and having heard read the original entry of the certificate of marriage between the respondent John Cooke and Caroline O. C. Palmer in the parish church of Monkstown, in the county of Dublin, on the 6th of August, 1868, the certificate of marriage between the said petitioner and the said respondent at Srinagar, Kashmir, India, on the 3rd of September, 1887, the marriage licence of the respondent, dated the 16th of August, 1887, and the copy certificate of marriage between the

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etitioner and the said respondent from the India Office, London, and having heard counsel thereon on behalf of the said petitioner, found :—

"1st. That this Court has jurisdiction to grant to the petitioner the relief sought by her in this cause, that relief being for a decree of nullity of her marriage with the respondent in India on the ground of his previous marriage with another woman still alive, notwithstanding that it is not stated that the petitioner has an Irish domicil, the respondent having an Irish domicil.

"2nd. That the respondent was lawfully married at Monkstown Parish Church, in the county of Dublin, to Caroline Olivia Cavendish Cooke (formerly Palmer), on or about the 6th of August, 1868.

"3rd. That the respondent did go through a ceremony of marriage with the petitioner at Srinagar, in Kashmir, in India, on or about the 3rd of September, 1887.

"4th. That Caroline Olivia Cavendish Cooke (formerly Palmer) was alive on and after the date of the marriage ceremony at Srinagar.

"And the Judge thereupon declared that the said marriage in fact (but illegally) celebrated between the petitioner and the said John Cooke is null and void, and that the petitioner is free from all bond of marriage with the said John Cooke, and decreed that the said John Cooke do pay to the petitioner her costs of and incidental to this suit.

Solicitor for the petitioner : *W. H. Corker.*

W. L.

REG. (MACKEY) *v.* JUSTICES OF CO. LIMERICK (1).

Q. B. Div. 1897. Oct. 26, 27.

Fishery Acts—Fishery (Ireland) Act, 1842 (5 & 6 *Vict. c.* 106), *ss.* 103, 106 *—Summary jurisdiction—Seizure of nets illegally fished in a river forming the boundary of two counties—Application for order of forfeiture at "the next Petty Sessions Court"—Jurisdiction of Justices of either county to hear the application—"Prosecution of an offence."*

Section 103 of The Fisheries (Ireland) Act, 1842, provides that in case an officer authorized to do so shall seize any nets illegally used, it shall be lawful for him "to retain the same in his custody until the next sitting of the Petty Sessions Court or any adjournment thereof in the district where the same shall be seized, and at such Petty Sessions Court it shall be lawful for the Justices to order the forfeiture of such nets."

Section 106 of the same Act provides that, "where any of the offences mentioned in" the Act shall be committed in or upon any lake or river forming the boundary between any two counties or sessional districts, "such offence" may be prosecuted in either of such counties or districts, and may be alleged and stated to have been committed therein.

On the night of the 3rd of January a water bailiff of the Board of Conservators of the Limerick district seized certain nets that were being illegally fished in M.'s eel weirs in the river Shannon, and applied on the 18th January to the Justices sitting at Castleconnell Petty Sessions for an order, and obtained an order, for their forfeiture. The river Shannon at this point forms the boundary between the counties Clare and Limerick, and between the Petty Sessions Districts of Doonass (Clare) and Castleconnell (Limerick). A Court of Petty Sessions sat at Castleconnell on the 4th, and at Doonass on the 15th of January.

M. having applied to quash the order:—

Held, that the proceeding to procure a forfeiture was a "prosecution of an offence" within sect. 106; that the words "next sitting of the Petty Sessions Court" meant the next sitting at which it was reasonably practicable to make the application; and that the Justices sitting at Castleconnell on the 18th had jurisdiction to make the order in question.

Held, further, that it was unnecessary for the Justices to set out on the face of their order that the Court was the Petty Sessions Court next sitting or an adjournment thereof.

(1) Before SIR PETER O'BRIEN, L.C.J., PALLES, C.B., and O'BRIEN and JOHNSON, JJ.

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CERTIORARI.

This was an application to make absolute conditional orders to remove and quash two orders of Justices, made at the Castleconnell Petty Sessions—the one dated the 1st February, the other the 15th March, 1897, directing in each case the forfeiture and sale of certain nets under section 103 of the 5 & 6 Vict. c. 106.

The present applicant, Anthony Mackey, was lessee of two eel weirs in the River Shannon, near Castleconnell, known as the Upper and the Lower Weirs. The close season for eels in the Limerick district is from the 1st February to the 30th June, inclusive. Mackey did not take out his licences for the year 1897 until the 5th January (1). Early on the morning of the 4th January, shortly after midnight, Captain Hall, Inspector of the Board of Conservators for the Limerick district, visited the Upper Weir, found the nets thereon in fishing order, and, acting under the powers contained in section 103 of the Act 5 & 6 Vict. c. 106, seized the nets and carried them off. The mid-thread of the river at the place in question forms the boundary of the counties Limerick and Clare. The nets thus seized on the Upper Weir were mainly on the Clare side of the middle of the stream; but both Upper and Lower Weirs were worked from the Limerick shore. The Petty Sessions district on the Limerick side is Castleconnell; that on the Clare side is Doonass. The next Court of Petty Sessions at Castleconnell, after the date of the seizure, was held on the 4th January, in the forenoon, the next thereafter on the 18th January. The next Petty Sessions Court at Doonass, after the seizure, was on the 15th. No application for forfeiture was made at the Petty Sessions for Castleconnell on the 4th. Captain Hall stated (in his affidavit as cause) that this would have been impossible; that he had no instructions to apply, and had not time to consult the Board or their solicitor, or direct their solicitor to apply. The solicitor for the Board attended however at the Castleconnell Sessions on the 18th, and applied for an order forfeiting the nets. The hearing of the application was adjourned to the 1st February, the next Court day, when an order of forfeiture and sale was made. Mackey's solicitor had been present in Court on the 18th when

(1) See *Hosford* v. *Mackey*, [1897] 2 Ir. R. 292.

the application was first made (immediately after a prosecution against his client for illegal fishing), and had notice in fact of the application, but no summons or formal notice of intention to apply, or of the adjournment, was served upon Mackey, and he was not present or represented on the 1st February.

This order Mackey now sought to have quashed on the special grounds (set out in the conditional order)—1, That the application was not made to the next Petty Sessions; 2, that there was no legal adjournment of the Petty Sessions at which the application was first made; 3, that the application was not made to the Petty Sessions of the proper Petty Sessions district. [The second objection was not pressed in the argument.].

On the morning of the 5th February, 1897, Captain Hall seized other nets on the Lower Weir, which (he stated) he had found thereon in fishing order, it being then the close season for eels. The nets so seized were mainly on the Clare side of the middle of the stream. An application for forfeiture was made at Castleconnell Petty Sessions on the 15th February, the next Court day after the seizure. On this occasion Mackey was represented; admitted ownership of the nets; but urged that the nets were hanging on the poles to dry, or, if let down for fishing, that an enemy had done this. After adjournments the application was finally disposed of on the 15th March, when an order for forfeiture and sale of the nets was made. The next Court of Petty Sessions, after the seizure for the Doonass district was held on the 12th February.

This order Mackey now sought to have quashed on the special ground (set out in the conditional order) "that the application was not made to the Petty Sessions of the proper Petty Sessions district."

Bushe, Q.C., and *Redmond Barry*, for A. Mackey.

Ronan, Q.C., and *Cullinan*, for the Board of Conservators, showing cause.

The following cases were referred to in argument:—*Yates* v. *Reg.* (1); *Reg.* v. *Justices of Sussex* (2); *Reg.* v. *Justices of Surrey* (3); Maxwell on Statutes (ed. 1892), 268; Paley on Convictions, 377.

Cur. adv. vult.

(1) 14 Q. B. D. 648. (2) 4 B. & S. 966. (3) 6 Q. B. D. 100.

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Oct. 27.

SIR P. O'BRIEN, L.C.J.:—

The decision in this case involves the determination of two questions of general importance. First, what is the true construction of the words, "next sitting of the Petty Sessions Court," which occur in the 103rd section of the statute 5 & 6 Vict. c. 106, whether the words "next sitting" are to be limited to the absolutely next sitting after the seizure referred to in the section, or whether these words mean the first sitting at which it is reasonably practicable to proceed for the forfeiture of the nets seized? The second question is whether a proceeding for the purpose of procuring an order forfeiting the nets seized is the prosecution of an offence within the meaning of the 106th section of the same Act.

These are the two main questions we have to determine. With reference to the first, that is, as to the true construction of the words "next sitting," we are of opinion that these words are not to be confined to the absolutely next sitting after the seizure, but that, on their true construction, they mean the first sitting, next after the seizure, at which it is reasonably practicable to proceed as in the section indicated. No doubt the proceeding is for a forfeiture, but all statutes, penal or otherwise, must receive a reasonable construction. Suppose that we confined the words "next sitting" to the next actual Sessions, the object of the Act of Parliament would in very many cases be defeated, for the duty, on such a hypothesis, imposed by the statute, would be often impracticable. Take the case of a seizure some miles from the Petty Sessions Court at 11 o'clock in the day, and the next sitting of the Sessions at 11.15; the thing could not be done; time would not permit; the nets and instruments seized are often very cumbrous, and the person who seizes is to provide for their safe custody until application made; in very many cases this could not be done if the words "next sitting" meant the next actual sitting. Again, see the difficulties which the construction contended for on behalf of Mr. Mackey would involve. The authorized officer should certainly seize the net or instrument when it is being used contrary to the provisions of the statute; but if he seizes, and it is not practicable to apply at the next actual Sessions, he becomes a trespasser, if the contention of Mr. Bushe be well founded. He holds the goods without any magisterial adjudication of forfeiture. This would be

a state of circumstances very likely to arise; and can it be supposed that the Legislature intended that the discharge of the authorised officer's duty under the statute should be subject to such risk; in fact, that the statute should be deprived of further operation, and the officer become a wrongdoer? Again, the authorised officer who seizes acts under a board of conservators; and it would appear to be reasonable that he should have time to consult the board as to his steps after the seizure; but this in many cases he would not have if the words "next sitting" meant the next actual Sessions. Independently of authority I should hold that the words "next sitting" mean the first sitting next after the seizure at which it was reasonably practicable to apply; but I think that this view is borne out by the case of *The Queen* v. *Justices of Surrey* (1). There it appeared that a right of appeal was given to "the next Quarter Sessions," the question arose, what was meant by these words; and it was held that they did not mean absolutely the next Sessions in point of time. The decision was that the appellant was entitled to a reasonable time before giving notice of appeal, to allow of his considering whether he should appeal, and the grounds on which his appeal should be based; that one day was not a reasonable time for the purpose; and that consequently the appellant was not bound to give notice of appeal for the absolutely next Sessions. The principle of that case, I think, applies to the present. The "next sitting," in my judgment, means the first sitting at which it is reasonably practicable to have the application heard, the first real opportunity which the officer has of bringing his case before the magistrates. Upon the first question, therefore, I am of opinion that Mr. Ronan's argument is well-founded. The seizure was made late on the night of the 3rd, and the magistrates may well have thought that it was impossible to bring the case forward on the 4th.

As to the point that this matter should appear on the face of the order, it does not seem that the forms under the Petty Sessions Act contemplate the recording of any such determination on the magistrates' part. The intention of the Act was that the forms thereby provided should be of general application, that is to say,

(1) 6 Q. B. D. 100.

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they were to be used so far as circumstances permitted. There is nothing in the affidavits to establish that the magistrates did not consider the question whether it would have been practicable to have made application on the 4th, and, the statute not requiring that their opinion thereon should be recorded, we are against Mr. Mackey on this point also. If the application could not have been made on the 4th, and was made at the first Sessions at which it was reasonably possible to proceed, the magistrates had jurisdiction.

The question remains whether the procuring of an order of forfeiture is the prosecution of an offence within section 106. That section does not use the word "offender"; it uses the word "offence." It says, "such offence shall and may be prosecuted before any Justice or Justices of the Peace in either of such counties or districts, and may be alleged and stated to have been committed therein." The word "offender" is not used. But what took place before the magistrates—what did they do? They did what they were empowered under the 103rd section to do; they ordered and directed that the nets should be forfeited. They heard witnesses; they judicially determined that the nets were being used in a proscribed manner; and ordered their forfeiture. In doing this they determined that an "offence" had been committed, as it was necessary that they should do before they directed a forfeiture. "A proceeding *in rem*" is a very familiar expression. This prosecution before the magistrates partook of all the characteristics of such a proceeding. It was adjudged that an offence had been committed, and that the offending instrument should be forfeited. What took place was in my opinion a prosecution of an offence within the meaning of the section.

PALLES C.B.:—

There are two questions here which ought to be kept distinct—1, Whether the Justices had jurisdiction in fact to make the order which is sought to be brought up; 2, if so, does that jurisdiction sufficiently appear upon the order to make it valid on its face?

The existence of the jurisdiction is denied upon two grounds: 1, it is said that the only Court which had jurisdiction to forfeit the nets, seized upon the Clare side, were the Justices of the Doonass district, in the county of Clare; 2, that even if the Justices sitting in Petty Sessions at Castleconnell had jurisdiction, that jurisdiction was in the Court that sat there on the 4th February, and not in the Court that made the order.

Whether the Castleconnell Petty Sessions had jurisdiction depends upon this: whether the proceeding to procure the forfeiture of the nets was the prosecution of an offence, within section 106? I am clearly of opinion it was; and I conceive that the argument of Mr. Bushe, upon this section, is based upon a confusion between "offence," the word which occurs in the section, and "offender." The net was not liable to forfeiture, under section 103, unless it was being used contrary to the provisions of the Act, and if it were so used, such user was an offence against the Act. It is true that the offender was not made amenable; but, notwithstanding that, there was a jurisdiction to forfeit the net; and such forfeiture could result only from a legal adjudication that, when seized, it was being used contrary to the provisions of the Act, or in other words, that an offence had been committed; and I am of opinion that any proceeding authorised by the Act to be taken to procure an adjudication that an offence against it had been committed, and such a sentence as, according to the nature of the proceeding, was that which was appropriate to such offence, is a "prosecution" of such offence within section 106. The difficulty intended to be remedied by that section—a difficulty amounting in many cases to an impossibility, that of proving, in the case of an offence committed in a river between two counties, or other local jurisdictions, the exact relation of the place where the act was done to the *medium filum aquae*—applies with as much force to a proceeding *in rem* as to one *in personam*. The words of the section are general; and such form of proceeding is within the words used. I am therefore of opinion that the first objection fails.

The second objection is that the Petty Sessions Court which was held on the 18th February, was not "the *next* sitting of the Petty Sessions Court," within the meaning of section 103. Upon

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this question, the decision in the *Queen* v. *Justices of Surrey* (1), a decision which commends itself to my mind as one which makes law and common sense go hand in hand, is a distinct authority. There, upon the construction of a statute which gave an appeal, a Court of Quarter Sessions which commenced its sittings upon the 6th of April, was held to be not the next after the 21st of March, because the notices of appeal to it should be served not later than the 22nd March; and as the object of the section was to give to the party decided against a real and practical, not merely a nominal, opportunity of appealing, the words of the section should be so read as to give the party a reasonable time to consider whether or not he would appeal. So here, the statute contemplates that in every case of a seizure under the circumstances mentioned in the section, there shall be a real opportunity of applying for an adjudication by the Justices as to the committal of the offence, and of obtaining their order that the net shall be forfeited. In the case put in the argument, of the *locus in quo* being several miles distant from the Petty Sessions court-house, and of the Court sitting within a few minutes after the seizure, there would be no such opportunity were the argument in support of this application correct. Therefore the section cannot mean absolutely "next" in point of time. The word "next" must at least extend to the next sessions at which it is possible that the complaint can be made; and where such a relation must exist between two periods of time, I think it will be found that the law never contemplates what is physically possible, as distinguished from what is reasonably possible under the circumstances of the case. Having regard then to the fact that the seizure was not complete until one o'clock on the morning of the day upon which the Petty Sessions Court sat, and that it was necessary that evidence should be given to prove the offence, I am of opinion that it was not reasonably possible that the case could have been brought forward at the Sessions of the 4th February.

Having arrived at these conclusions, it follows that in my view the magistrates had jurisdiction in fact.

There remains the question, whether the order is void by reason of any omission to sufficiently show jurisdiction on its face?

(1) 6 Q. B. D. 100.

I confess that if the case were to be decided upon the law as it stood prior to the commencement of the present reign, and without reference to the 14 & 15 Vict. c. 93, I should probably have felt constrained to come to the conclusion that jurisdiction was not sufficiently shown, because it does not appear upon it that it was made by the Justices at the "next" Petty Sessions. But, in my opinion, the express provisions of that statute render such a statement unnecessary, and consequently the order is good. That statute provides a form of Justices' Order Book, which it gives the Lord Lieutenant in Council power to vary from time to time, and it enacts that the entry of an order shall be as follows, viz.:— "One of the Justices then present shall thereupon enter or cause the clerk to enter the particulars of such case and the substance of the decision thereon" in the book, ... "and such entry, when one of the Justices present shall have signed his name opposite to it, or after it . . . shall be deemed *to all intents and purposes* to be a conviction or order, as the case may be."

The form in the statute has been altered by Order in Council, and the now operative form describes the Court by statements in the heading of the county and of the Petty Sessions district, and by the names of the Justices by whom the order is made, for which names there is an appropriate column in the form, viz. col. 3. In cases in which the jurisdiction to act depends upon the mere fact of a person being in the Commission of the Peace, and without the existence of any other circumstance personal to himself, such, for instance, as his being a Resident Magistrate, I am of opinion that the Court is sufficiently described in the order when the two blanks I have referred to in the heading are correctly filled up, and the names of the Justices correctly given in the third column. All this is matter of form, and not of substance. Accused persons are not deprived of any right by this construction of the statute; for, notwithstanding the statute, it is still as necessary, as it was before it, that jurisdiction should in fact exist, and that that jurisdiction should be exercised according to law. Before the statute, in a case of this description, five conditions should have been complied with to render the order a valid one:—1, As a matter of fact, the order should have been made at "the *next* sitting of the Petty Sessions Court, or an adjournment thereof"; 2, the Justices should have

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Palles, C.B.

judicially determined that the Court in which they were then sitting did answer that description; 3, there should have been sufficient evidence to enable them to arrive at that conclusion; 4, this Court on *Certiorari* should be of opinion and should determine, as a matter of fact upon the evidence, that the sitting in question was the "next sitting" of the Court; 5, it should have been stated on the face of the order that the Court adjudicating was the Justices at such "*next* sitting, or an adjournment thereof." In my view, the effect of the statute is to render it unnecessary to the validity of the order that the 5th condition should be satisfied. The other four must still be, and in this case have been, complied with, and therefore this—the last—objection fails. Both these motions should be refused with costs.

O'BRIEN, J., concurred.

JOHNSON, J:—

The terms "offences" and "offence," in the 5 & 6 Vict. c. 106, sect. 106, and 13 & 14 Vict. c. 88, sect. 47, include, in my opinion, whatever is made unlawful by, or penally violates, the provisions of the Acts. A net attached to the eye of a weir in fishing order (and therefore fishing) contrary to the provisions of the Acts is unlawful, and therefore a qualified person, having lawfully seized the offending net under the authority given by the 5 & 6 Vict. c. 106, sect. 103, is by that section empowered to follow up or "prosecute" the offence by duly obtaining an order of Justices in Petty Sessions, condemning and forfeiting the net. The general procedure of Petty Sessions is governed by the Petty Sessions Act, and is not, nor is the Petty Sessions Order Book, in which the proceedings are recorded, inapplicable (as contended) to an application to condemn and forfeit a net under the Fishery Acts. It is argued that such an application is *in rem*; that there is no "complainant" because there is no defendant, and no "complaint" because there is no information or summons; but the Petty Sessions Act, by section 37, provides that the prosecutor, or party at whose instance the proceedings shall take place (in the present case the person proceeding for the forfeiture), may be

termed the complainant, whether informant, prosecutor, or otherwise, and the matter of the proceeding may be termed the complaint, whether founded on an information or otherwise. Now, turning to the form of the Order Book, we find that in such a case as the present the following entries would appear:—Column 1, the number of the case in the order for hearing; column 2, the date of the order; column 3, the names of the Justices by whom the order is made; column 4, the complainant, being the person proceeding for the forfeiture; column 5, the names of the witnesses examined to prove the circumstances establishing the right to seize the net, and have it condemned and forfeited; column 6, the matter of the proceeding; column 7, the order condemning or forfeiting the net; column 8, the Acts and sections under which the order is made; columns 9 to 14, being inapplicable, have a line drawn through them; and column 15 contains the signature of the presiding Justice.

Then it was contended that inasmuch as the net was seized on the night of the 3rd, or in the early morning of the 4th, the sitting of the Petty Sessions on the 4th was "the next sitting of the Petty Sessions Court," which, or an adjournment of which, alone had jurisdiction to deal with the matter under the 5 & 6 Vict. c. 106, sect. 103. The solution of the question depends on the meaning of these words "next sitting." This, as every other statute, must receive a reasonable construction, having regard to its language, scope, and subject-matter. One of its principal objects, as appears on its face, is to prevent and punish illegal fishing, which, it is common knowledge, is not unfrequently carried on by means of nets, under cover of night, facilitating those engaged in it to abandon the net, and by flight to escape identification and detection. Instances have been given at the Bar, and by the Bench, where it would be absolutely and physically impossible to proceed at Petty Sessions sitting (it may be) immediately after the seizure; and in such cases a literal construction of the words "next sitting" would obviously reduce the enactment to an absurdity. I therefore think that "the next sitting of the Petty Sessions" in 5 & 6 Vict. c. 106, sect. 103, means and must be construed to be the next reasonably practicable sitting of the Petty Sessions Court, having regard to the circumstances of

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the particular case; and, applying that construction to the facts of the present case, I think that the Justices were right in holding that the sitting of the Petty Sessions on the 4th—the next in point of time—was not the next reasonably practicable sitting of the Court after the seizure of the net.

Then it is contended that the Justices at the Castleconnell Petty Sessions in the county of Limerick had not jurisdiction to deal with forfeiture of the net for illegal fishing on the county Clare side of the *medium filum aquæ* of the Shannon, which at the place in question forms the boundary and mearing between the two counties, and between the Petty Sessions district of Castleconnell in county Limerick on the one side, and of Doonass in county Clare on the other side; and that, if they had jurisdiction (it being out of the county for which they held the Commission) their jurisdiction ought to have appeared by averment on their order. The first part of this contention is answered by the 13 & 14 Vict. c. 88, s. 47, which provides that under such circumstances as appear in the present case, the offence may be "alleged and stated to have been committed in either county," viz. if the proceeding is before the Justices of the county Limerick, then that the offence was committed in the county Limerick, and so as to the county Clare; and it is then a matter of evidence that the facts existed which brought the case within that county for adjudication. Such evidence now does not (as otherwise before the Petty Sessions Act) appear on the face of the entries in the Petty Sessions Order Book, nor is it certified to be the order as provided by the Petty Sessions Act. This therefore answers the second part of this contention, and it follows in my opinion that for the reasons I have stated the orders—for they are in no sense convictions: see section 37 of the Petty Sessions Act—which are challenged, are valid, and the conditional order ought to be discharged.

Solicitor for applicant: *F. Fitt.*

Solicitor for respondents: *W. Counihan.*

A. E. R. J.

SARAH COWELL, GRANTOR; JOHN BUCHANAN, GRANTEE (1).

Land Com. 1897. Jan. 11, 27.

Appeal. March 16, 17. June 17.

Landlord and tenant—Redemption of Rent (Ireland) Act, 1891 (54 & 55 *Vict. c.* 57, *ss.* 1, 3)—*Land Law (Ireland) Act*, 1896 (59 & 60 *Vict. c.* 47, *s.* 5, *sub-s.* 2, *s.* 7, *sub-s.* 3)—Bona fide *occupation*.

If a landlord makes a fee-farm grant of lands partly in his own possession and partly in the hands of a yearly tenant at the date of the grant, the grantee is not entitled, either under sect. 5, sub-sect. 2, or sect. 7, sub-sect. 3, of the Land Law (Ir.) Act, 1896, to redeem a proportionate part of the fee-farm rent.

Decision of Bewley, J., affirmed by the Court of Appeal (Lord Ashbourne, C., and FitzGibbon, L.J.; *dubitante* Walker, L.J.).

Semble, per Bewley, J.: The provisions of sect. 5, sub-sect. 1, and sect. 7, sub-sect. 1, apply to fee-farm grantees and to leaseholders, to whom the provisions of the Land Law (Ir.) Act, 1887, do not apply by reason of the duration of the demise.

APPLICATION by the grantor to set aside an originating notice by the grantee under the Redemption of Rent (Ireland) Act 1891. A former originating notice was set aside on 11th January, 1892. The facts are fully set out in the judgments of Bewley, J. (at pp. 148, 149), and of Fitz Gibbon, L.J. (at p. 154), and in the report of the previous application (2). The only change in the facts since the previous hearing was that the rent payable by the sub-tenant Patterson had been reduced to £29.

R. E. Meredith, Q.C., and *A. C. Meredith*, for the grantor:—

The Redemption of Rent (Ireland), Act 1891, does not apply, because the grantee is not in occupation of the entire lands. The grantee has no right to have the rent of the entire lands redeemed. The provisions of section 5, sub-section 2, section 7, sub-section 1, or section 7, sub-section 3, do not enable the Court to redeem portion of a rent, and do not apply to fee-farm grants at all. The words "unless the application to the Court is made on the expiration of a lease," show this, and that this sub-section was

(1) Before BEWLEY, J., and FITZGERALD, Q.C., Commissioner.

(2) 30 L. R. Ir. 375.

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intended to apply to cases falling within section 15 of the Act of 1881.

COWELL, *Grantor*; BUCHANAN, *Grantee.*

Campbell, Q.C., *Dane, Q.C.*, and *Fetherstonhaugh*, for the grantee:—

We base our case on sub-section 3 of section 7 of the Act of 1896. The grantor in a fee-farm grant never had any interest in the question whether the tenant was in occupation or not; but he could have had the application dismissed if the grantee was not in occupation of the entire lands, and it was to meet this that sub-section 3 of section 7 was enacted.

This originating notice should not be dismissed in a summary way on motion.

Jan. 27.

BEWLEY, J.:—

This was an application by the grantor to set aside an originating notice by the grantee under the Redemption of Rent (Ireland) Act, 1891, served on the 2nd November, 1896. A former originating notice of a similar character served on the 17th October, 1891, was set aside by the Court, by an order dated the 11th January, 1892, on the ground that the grantee was not in *bona fide* occupation of the holding, the subject of the proceedings. The former case is reported in 30 L. R. (Ir.) 375. The holding contains 329A. 0R. 9P. statute measure, and is held under a fee-farm grant or lease for ever, dated the 22nd May, 1867, made by Thomas Bailey, the predecessor in title of Sarah Cowell, the present landlord, to Christopher Buchanan, the father and predecessor in title of the present tenant, at the yearly rent of £270.

Admittedly, John Buchanan, is not in occupation of a considerable portion of the holding. At the time of the service of the originating notice in 1891, 108A. 1R. 7P. of the holding were in the occupation of three sub-tenants, whose yearly rents amounted in the aggregate to £66 11*s.* 6*d.* These tenants are still in occupation of the same holdings, and the only change that has taken place is that the total amount of the yearly rents now payable by them has been reduced to £58 10*s.*

One of the sub-tenants, William Patterson, holds 69A. 3R. 9P. at a judicial rent of £29 per annum, and his tenancy was created thirteen years prior to the execution of the fee-farm grant of the

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22nd May, 1867, by Thomas Bailey, the then owner. The existence of this sub-tenancy was fatal to the former application of the grantee. The right to apply under the Redemption of Rent Act of 1891 is confined to persons in *bona fide* occupation. John Buchanan had not the actual occupation of the portion of the holding that was included in the letting to William Patterson, and he could not successfully claim to have the constructive or hypothetical occupation that may exist in certain events under section 57 of the Land Act of 1881, inasmuch as it was not a case where a tenant had sublet part of his holding with the consent of his landlord. The letting to William Patterson had been made by Thomas Bailey, the landlord, and not by the tenant or any predecessor of his.

It is contended, however, on behalf of the grantee that the Land Act of 1896 has so altered the law that he is now entitled to relief under the Redemption of Rent Act of 1891, and reliance is placed on section 7, sub-section 3 of the recent Act. By virtue of section 48, sub-section 1, the expression "Land Law Acts" includes the Redemption of Rent Act of 1891.

To sustain an application under the Redemption of Rent Act the applicant must be a grantee under a fee-farm grant or a lessee under a long lease excluded from the provisions of the Land Act of 1887, by reason of the period of its expiration, or by reason of its being renewable or perpetual: he must be in *bona fide* occupation of his holding: the holding must be one to which Part I. of the Land Act of 1881, applies; and he must hold his land at a full agricultural rent. Where these conditions are fulfilled the relief to which the applicant is primarily entitled is to redeem the rent reserved by the fee-farm grant or lease, as the case may be. If in such case the grantor or lessor does not consent to the redemption in the manner and within the time prescribed by the Land Commission, the grantee or lessee is deemed to have made the prescribed application under section 1 of the Land Act of 1887, and he is entitled to be held to be a tenant of a present tenancy in manner and subject to the conditions and right of resumption mentioned in section 21 of the Land Act of 1881, as modified by sect. 1 of the Land Act of 1887, and his holding becomes subject to the provisions of the said Acts with regard to present tenancies.

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The Redemption of Rent Act does not deal directly with the fixing of a fair rent. Like the first section of the Land Act of 1887, when the necessary conditions exist, it brings the holding, the subject of the proceedings, within the operation of the Land Act of 1881, and thus gives the applicant the *status* to have a fair rent fixed under the 8th section of that Act.

A leaseholder seeking to avail himself of the benefit of the 1st section of the Act of 1887 almost always applies by the same originating notice to have a fair rent fixed, and the ordinary form of an originating notice under the Redemption of Rent Act contains an application by the lessee or grantee to the Court, in the event of the lessor or grantor not signifying his consent to the redemption of the rent in the prescribed manner and within the prescribed time, to be deemed a tenant of a present tenancy in the holding, and for an order fixing the fair rent to be thereafter paid for the same; but where a fair rent is fixed in either of these cases, it is not fixed under the Land Act of 1887 or the Redemption of Rent Act, but under the Land Act of 1881.

To what extent, then, have the conditions necessary to sustain an application under the Redemption of Rent Act been modified by the Land Act of 1896? Two of these conditions, as already pointed out, are:—1st, That the applicant shall be in *bona fide* occupation of his holding; and, 2nd, that the holding shall be one to which Part I. of the Land Act of 1881 applies. So far as the recent Act has extended the class of holdings coming within Part I. of the Act of 1881, or has relaxed the conditions of occupation in the case of tenants applying under the Land Law Acts, it would naturally be made applicable to cases coming within the Redemption of Rent Act, and accordingly sub-section 1 of section 5, and sub-section 1 of section 7, seem clearly to apply to proceedings under the Redemption of Rent Act. There is no difficulty in applying these provisions whether a rent is being redeemed, or, in default of the lessor or grantor consenting to the redemption, to a tenant being held to be a tenant of a present tenancy to which the Land Act of 1881 applies. But when we come to deal with sub-section 2 of section 5, and sub-section 3 of section 7, other considerations arise. How can these provisions be applied to the redemption of a rent? The only relief which they

profess to give is to enable the Court to divide the property comprised in a demise into two parts: to apportion the existing rent between these two parts: to treat as a separate holding the part excluded from the Land Law Acts, either as being demesne land or as not being agricultural or pastoral, or as being an incorporeal hereditament, in the case of section 5, or the part excluded as being sublet, in the case of section 7, and to fix a fair rent on the remainder of the property.

It was not, and could not be, contended in the present case, that in cases coming within either of the sub-sections referred to, a right to redeem the entire rent reserved by the lease or fee-farm grant would exist. If the property comprised in the lease or grant consisted of a farm and some houses in a country town or village, or a farm and the tolls of a fair, it could not be said that this property was a holding to which Part I. of the Act of 1881 applied, or that the rent payable was an agricultural rent, nor in the case of a holding such as the present, coming within sub-section 3 of section 7, could the lessee or grantee be treated as being *bona fide* in occupation. It follows, therefore, that if a long leaseholder or fee-farm grantee can in such cases obtain any relief under the Land Law Acts it must be restricted to the fixing of a fair rent on portion of the property, without any right of redeeming the rent, or that the right of redemption must be confined to an apportioned part of the rent.

It would certainly be strange that a lessee or grantee, the nature of whose estate was such as to fall within the interests dealt with solely by the Redemption of Rent Act, and whose only right to make any application to the Court was under that Act, should by virtue of the provisions of sub-section (2) of section 5, or of sub-section (3) of section 7, of the Act of 1896 be given none of the rights to which a lessee or grantee is entitled under the Redemption of Rent Act, but a different right outside that Act, and within the Act of 1881, viz. the right of having a fair rent fixed. On the other hand, if it was intended that in such cases a lessee or grantee should be entitled to redeem a portion of the rent reserved by the lease or grant, one might expect that some reference to such a right should be made in the provisions under consideration. In neither of the sub-sections referred to is there

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any mention of any right of redeeming an apportioned part of the rent, or of any right in respect of what is termed "the remainder of the property," except the fixing of a fair rent thereon. The provisions of sub-section (2) of section 5 make the exercise of the power thereby given depend on the Court being of opinion that "apart from the fixing of a fair rent," the separation of the property into two parts will not diminish the value of the landlord's interest therein—language which implies that the separation will be necessarily followed by the fixing of a fair rent for the agricultural or pastoral portion of the holding. This is inconsistent with the existence of a right to redeem an apportioned rent issuing out of the same portion of the holding.

Sub-section (3) of section 7 contains provisions which are substantially analogous, and in neither sub-section can I find any language to support the contention that a right to redeem an apportioned part of a rent exists, or that a grantee or lessee can apply under the Redemption of Rent Act to fix a fair rent on a portion of the property comprised in the fee-farm grant or lease. Such right, if intended to have been given, would in my opinion have been given by express legislation, and not left merely to implication; and I can conceive many reasons why the provisions of the sub-sections in question should not have been considered suitable in the case of a fee-farm grant or long lease.

I do not think that the refusal or neglect by a grantor or lessor in a case like the present to give the consent referred to in the Redemption of Rent Act could improve the position of a person applying under the Act. If the case does not come within the first clause of section 1 of the Act, the grantor or lessor has no power to give any consent. The proviso at the end of that section as to the effect of the grantor or lessor refusing or omitting to give the prescribed consent can only be operative where it is competent for the grantor or lessor to give such a consent. If a case is outside the first branch of the section it is equally outside the last, and the refusal or omission by the grantor or lessor to give a consent which he had no power to give could not benefit the person applying under the Act.

I am of opinion that the originating notice in the present case cannot be sustained under section 7, sub-section 3 of the

recent Land Act, or under any provisions of the Land Law Acts, and that the application to dismiss it should be granted with costs.

T. H. M.

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March 15, 16. June 17.

The grantee appealed to the Court of Appeal (Lord Ashbourne, C., and Fitz Gibbon and Walker, L.JJ.).

George Wright, Q.C., Dane, Q.C., and *T. M. Healy,* for the appellant:—

The Court can fix a fair rent on "the remainder of the property" in the occupation of the tenant; the case is within the 3rd sub-section of section 7 of the Land Law (Ireland) Act, 1896. The expression "Land Law Acts" in that section includes "the Redemption of Rent (Ireland) Act, 1891," by virtue of the definition clause given in section 48 of the Act. The Act of 1896 treats the Acts of 1881, 1887 and 1891 as parts of one entire code, and introduces amendments in each to enable them to be read together, so as to confer rights on tenants irrespective of the length of their tenure. The intention of the Legislature is plain, and the Court of the Land Commission should not be astute to raise difficulties in the way of carrying out the redemption of or the fixing of the fair rent.

The Rt. Hon. The Macdermot, Q.C., Meredith, Q.C., and *A. C. Meredith,* for the respondent:—

The scope of the 7th section is limited to yearly tenancies and leases within the Act of 1887: this is plain from the use of the words "demise," "expiration of a lease," "continuance of the tenancy," &c.; and also from the fact that the relief thereby given is "the fixing of a fair rent" on "the remainder of the property," not the redemption of a rent to be apportioned on such remainder. No power to apportion any rent on such remainder is given, nor is there any power to redeem any apportioned rent.

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June 17.

LORD ASHBOURNE, C.:—

Lord Justice Fitz Gibbon will deliver the judgment of the Court.

FITZ GIBBON, L.J.:—

This appeal raises a difficult question as to the effect upon the Redemption of Rent Act, 1891, of the Land Act, 1896.

The tenant served an originating notice dated October 29, 1896, under the Act of 1891, applying to redeem his rent, and for an advance under the Land Purchase Acts of the whole capital sum required for such redemption, or if the landlord did not consent to the redemption, then to have a fair rent fixed under the Acts of 1881 and 1887. The holding is held under a fee-farm grant dated May 23, 1867, made by Thomas Bailey, from whom the present landlord derives her title, to Christopher Buchanan, the appellant's father. It consists of the lands of Gortatole in the county of Fermanagh, described in the fee-farm grant as "now or lately in the possession or enjoyment of the said Thomas Bailey and his undertenants, the said Christopher Buchanan and William Patterson, and containing 329A. 0R. 9P." As a fact, William Patterson had been in occupation of a substantial part of the lands as tenant from year to year for thirteen years before the grant, and he is so still; his holding comprises 69A. 3R. 9P.; his rent was formerly £38, afterwards reduced to a judicial rent of £29. As regards Patterson's portion of the lands, the fee-farm grant to Buchanan operated only as a grant of the reversion upon his tenancy, and there was no subletting through which Buchanan, under the proviso in the Act of 1881, section 57, could be "deemed to be still in occupation."

Two other undertenants named Leonard occupy 38A. 1R. 38P. more of the lands comprised in the fee-farm grant, at judicial rents amounting in all to £20 10*s*. There is some difficulty, upon the evidence, in determining whether these Leonards are in the same position as Patterson, or whether they might not, on the principle of *Keating* v. *Bolton* (1), be treated as holding under sublettings from Buchanan with the grantor's consent. But it is unnecessary to discuss their

(1) 22 L. R. Ir. 143.

position, because, in any aspect of the case, Patterson's holding is a substantial portion of the lands comprised in the grant, which is not, and never was, in the actual or hypothetical occupation of the grantee; and, as the grantee is in the actual occupation of "less than seven-eighths or thereabouts in value of the holding," he cannot rely on the Act of 1896, section 7, (1) (*b*), even if that section could otherwise be called to his aid.

There has unfortunately been considerable litigation between the parties. On October 10, 1891, the tenant served an originating notice under the Redemption of Rent Act, 1891, which was set aside by the Land Commission on January 11, 1892, because he was not "in *bona fide* occupation." Mr. Justice Bewley's judgment on that occasion is reported: *Cowell* v. *Buchanan* (1). On April 29, 1892, the tenant applied, as a middleman, to ascertain the fair rent of the portion of the holding, 220A. 3R. 2P., which was in his own occupation, with a view to surrendering his estate in the whole. Under the Act of 1887, section 8, an order was made on July 22, 1993, ascertaining the fair rent of Buchanan's part at £145, which, with the judicial rents paid by the undertenants, amounted to considerably less than the rent payable under the fee-farm grant. But Buchanan then refused to surrender, although it is stated that the landlord, at that time, was willing to accept a surrender. The landlord afterwards, on December 21, 1894, applied to restrain the tenant from surrendering, on the ground that a surrender would be inequitable, and when this application came on for hearing, the tenant disclaimed any right to surrender under the Act of 1887. The Court made "no rule" upon the application, except as to costs, and so those proceedings fell through.

A third proceeding taken by the tenant, claiming rights under the Act of 1896, now comes before us. The landlord moved to set aside the tenant's third originating notice, on the same ground on which the first was set aside in 1892, namely, that the tenant was not in *bona fide* occupation of the holding. The Land Commission granted this application, being of opinion that there was nothing in the Act of 1896, to remove the disqualification which

(1) 30 L. R. Ir. 375.

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had been held, in 1892, to prevent Buchanan from redeeming his fee-farm rent, under the Act of 1891.

We are all of opinion that the decision of 1892 was right upon the Act of 1891, and that the grantee, not being in occupation of the entire holding, could not then redeem his rent. Accordingly, the question now resolves itself into an inquiry as to the effect of the Act of 1896, in relaxing or removing the conditions and restrictions which prevented certain fee-farm grantees, including Buchanan, from redeeming their rents under the Act of 1891.

It is necessary, first, to study the words of the Act of 1891, in order to see what that Act really provides, before considering whether, or how far, it has been affected by the Act of 1896. The applicant must be "a person in *bona fide* occupation of a holding to which Part I. of the Land Law (Ireland) Act, 1881, applies." Being also "a lessee under a lease to which the provisions of section 1, or section 3 of the Land Law (Ireland) Act, 1887, do not apply by reason of the period of its expiration, or by reason of its being renewable or perpetual," or being "a grantee under a fee-farm grant," such person must hold his land "at . . . *a full agricultural rent.*" Fulfilling these conditions, but not otherwise, "such occupier" is "entitled to apply . . . *to redeem his rent.*" None but a *bona fide* occupier, holding at a full agricultural rent, can apply, and the only application which he is entitled to make, in the first instance, is an application to redeem his rent. "Whereupon" (showing that all the subsequent provisions rest on the right to apply to redeem the rent), "if the lessor or grantor, . . . signifies his consent, . . . *then such redemption shall be effected* by payment, subject to the rules of the Land Commission, of such capital sum as may be agreed upon, or as in case of difference may be determined by the Land Commission (regard being had to the adequacy of the security) in like manner as if it were a head-rent redeemed under the provisions of section 16 of the Land Law (Ireland) Act, 1887."

It is very material to observe that whenever the occupier applies to redeem his rent, and the lessor or grantor signifies his consent, the Act requires that the redemption *shall* be effected, "subject to the Rules of the Land Commission," and

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the only thing to which the Land Commission is expressly required to have regard is "the adequacy of the security." The agreement between the parties need not even be complete, for if they differ about the price, the Land Commission may determine it.

There is no occasion—there is even no jurisdiction—to fix a fair rent, or to consider any question, or to take any proceeding, connected with fixing a fair rent, in any case in which the first and normal object of the Act, the redemption of the rent, is attained. The question which we have to decide, therefore, cannot arise except under the following proviso:—"Provided that if the lessor or grantor . . . does not consent to such redemption . . . *the redemption shall not be made, but* the lessee or grantee . . . shall be *deemed to have made the prescribed application under section one of the said Act of* 1887, and shall be held to be a tenant of a present tenancy, in manner . . . mentioned in section twenty-one of the said Act of 1881, as modified by section one of the said Act of 1887, and his holding shall be subject to the provisions of the said Acts with regard to present tenancies." This proviso does not come into operation at all in any case in which there is a consent to the redemption of the rent, and it seems equally clear that, whenever it does come into operation, it operates, according to its terms, upon the entire rent, and the whole holding, and the hypothetical application under the Act of 1887, sect. 1, and the hypothetical present tenancy are co-extensive with the actual application for redemption, and with the tenancy at the "full agricultural rent" mentioned in the leading clause. The proviso is in the nature of a penalty upon the landlord for not consenting to the redemption, or at least it puts a sort of statutory pressure upon him to give his consent, and it seems repugnant to the whole plan and construction of the section to hold that any rent can be affected or dealt with under the proviso, which could not have been redeemed under the clause to which the proviso is attached. Furthermore, when the proviso comes into play, the grantee or lessee is to be held to be a tenant of a present tenancy within the Act of 1881, sect. 21, as modified by the Act of 1887, sect. 1, and the holding is made subject to all the provisions of those Acts with regard to present tenancies. This shows that the application of the Act of 1891 must be co-extensive

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with that of the Acts of 1881 and 1887, and that the Redemption of Rent under the Act of 1891 must be confined to holdings which, in their character and circumstances, but for the length of tenure, would be within the previous Acts. The natural inference would be that the fair rent to be fixed under the proviso must issue out of the same one and entire holding for which the grantee paid the rent which he applied to redeem, and for which the redemption price would be payable, if the landlord did not withhold his consent. Being satisfied, as we all are, for these reasons, that the decision of the Land Commission in 1892 was right, and that the grantee did not come within the Act of 1891, standing alone, we have now to see whether the same grantee, being still in the same position, has been supplied by the Act of 1896 with any means of getting into the Act of 1891, either as to the whole or as to any part of his rent?

The words upon which the grantee must rely are the words of the definition clause, sect. 48 (1). "In this Act, unless the context otherwise requires . . . the expression 'Land Law Acts' means the Land Law (Ireland) Act, 1881, except Part V. thereof, the Land Law (Ireland) Act, 1887, except Part II., and the Land Law (Ireland) Act, 1888, and the Timber (Ireland) Act, 1888, and the Land Law (Ireland) Act, 1888, Amendment Act, 1889, and the Redemption of Rent (Ireland) Act, 1891, and does not include the Landlord and Tenant (Ireland) Act, 1870, except so far as the provisions of it are necessary for giving effect to the above-mentioned portion of the Land Law (Ireland) Act, 1881." The next definition is also material: "the expression 'Land Purchase Acts' means the Purchase of Land (Ireland) Act, 1891, the Land Purchase Acts as therein defined, and the Redemption of Rent (Ireland) Act, 1891." As defined in the Purchase Act, 1891, sect. 42, the expression "Land Purchase Acts" means "the Landlord and Tenant (Ireland) Act, 1870 (Parts II. and III.), the Landlord and Tenant (Ireland) Act, 1872, the Land Law (Ireland) Act, 1881 (Part V., Part VI., and Part VII.), the Tramways and Public Companies (Ireland) Act, 1883 (Part II.), the Land Purchase Acts, 1885 and 1888, the Land Law (Ireland) Act, 1887 (Parts II. and IV.), and the Purchase of Land (Ireland) Amendment Act, 1889." Therefore, in the Act of 1896 we have the

Redemption of Rent Act, 1891, included in two different definitions, and wherever we find either of the expressions "Land Law Acts" or "Land Purchase Acts," we have a positive enactment that the Act of 1891, with all these other Acts, is meant "unless the context otherwise requires." No doubt places may be found in the Act of 1896 where effect can be given to one or other of these *omnibus* definitions. But there are many cases in which the language of the Act would become inofficious, and even unintelligible, if we were to read all the Acts which are comprised in the definition as meant by the defined phrase. Hence the necessity for the qualification at the beginning of sect. 48—"unless the context otherwise requires." Accordingly, whenever the defined term occurs, *prima facie*, all the enumerated Acts are to be included, and the onus of showing that the context requires a more limited meaning rests upon those who say that the wider signification is inapplicable. The appellant has, however, to depend entirely upon the interpretation clause, qualified as it is by reference to the context. The habit of introducing such clauses has become inveterate, and though they may may be sometimes convenient, they often give rise to difficulties of interpretation. They sacrifice the precision of "Lincoln's Inn drafting," and they compel us to have recourse to the statutory dictionary, as if we were dealing with a foreign language, whenever one of the defined terms is used.

The clause upon which the present case depends is sub-section (3) of section 7 of the Act of 1896. That section is framed in a peculiar way; each sub-section is a distinct enactment. The words with which sub-sect. (1) opens—"For the purpose of the Land Law Acts"—form no part of sub-sect. (3). The same words "the Land Law Acts," occur towards the end of sub-sect. (3); but that sub-section is not introduced, nor governed, by the words—"For the purpose of the Land Law Acts."

The material words of sub-sect. (3) are as follows:—"Where a part of the property held under one demise is sublet, and the property was let to the tenant subject to the tenancy of some other person in the part sublet, the Court may . . . direct that the part so sublet shall thenceforth be . . . a separate holding, and . . . that the same shall be held during the continuance of the tenancy

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at such rent as the Court determine to be *the proper proportion of the rent reserved by the demise*, and the Court may fix a fair rent for *the remainder of the property held under the demise.*" So far the "Land Law Acts" are not mentioned at all, and if the sub-section had stopped there, it could not have been contended that the powers given could be applied to the redemption of a fee-farm rent. The division of the rent into proportions, and the continuance of the tenancy under the demise, are alien to the objects of the Act of 1891. But sub-sect. (3) continues:—"and the Land Law Acts as amended by this Act *shall apply to that remainder* as if it were a separate holding." The Land Acts are to apply, not to the entire holding, but only to what is left of it after a sublet part of it has been "treated as a separate holding" to be held at a proportion of the reserved rent determined by the Court. But the sub-section ends with a general proviso:—"Provided that if the landlord so elect, the Court shall, *in any case to which this sub-section applies*, order that the tenant of *the part so sublet shall* be the tenant of such landlord as his immediate landlord." As this proviso gives an option to the landlord in every case to which the sub-section applies, the sub-section cannot apply to any case in which this option would not be open to the landlord with reference to the sublet part of the holding.

Does the expression "Land Law Acts," as used in this sub-section, mean all the enactments enumerated in the definition given in section 48? If so, the Redemption of Rent Act, 1891, must apply to "the remainder of the property" held under the fee-farm grant, and not sublet. But the rent of that remainder is to be "a fair rent" fixed by the Court. Is that rent of a remainder to be redeemable under an Act, which gives power to fix a fair rent only in case of the landlord's refusal to consent to redeem *the whole rent* reserved? What is to become of the other part of the reserved rent, which the Court must determine as "the proper proportion of the rent reserved by the demise," which is to be payable "during the continuance of the tenancy" out of "the part sublet," which is to be "a separate holding," and which, not being in the occupation of the tenant, is not within "the Land Law Acts" at all? These difficulties suggest the further question whether, in section 7 (3), the context does not require that the expression

"Land Law Acts" shall receive a limited meaning, and shall not be construed as including the Redemption of Rent Act, 1891? If so, the grantee in the present case gains no advantage by the recent Act, and remains—where he was decided to be in 1892—outside the Act of 1891. To ascertain the meaning of "Land Law Acts" in accordance with the context, we may fairly ask, what is the power which the appellant has asked the Court to exercise? The originating notice asks for the exercise of the primary power given by the Act of 1891, namely—"*to redeem his rent*" and applies for an advance of the whole capital sum required for that purpose. It is only if the grantor refuses to redeem that the Court is requested *thereupon* to exercise the secondary power of fixing the fair rent *of the holding*. But this step is not the primary object of any proceeding under the Act of 1891, it is only a consequence contingent upon the grantor's refusal to agree to the exercise of the primary powers given to the Court by the Act, the power to redeem the rent, and, in case of difference, the power to determine the price. Furthermore, in every case under the Act of 1891, the power to redeem extends to the entire rent, and to the entire holding; and whenever, under that Act, a fair rent is fixed at all, it becomes payable for the entire holding, and the entire holding becomes subject to all the provisions with regard to present tenancies. Under the Act of 1896, section 7 (3), on the other hand, before any fair rent can be fixed, the holding must be divided, and the rent must be apportioned, and part, both of the land and of the rent, must be taken altogether out of "the Land Law Acts," including the Redemption of Rent Act, 1891, itself.

This raises the further difficulty—If the appellant is right, what rent, if any, can be redeemed in this case? The originating notice applies to redeem the whole £270. But that cannot be done, unless we hold that an advance can be made to a middleman, out of the public funds, for the redemption of a head-rent which is not within the Act of 1891 at all. But if the entire rent is not to be redeemed, the irredeemable part must first be determined by the Land Commission as the proper proportion of rent reserved by the fee-farm grant in respect of the holdings of Patterson and the Leonards. But if such a

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division of the rent were made before the landlord was called on to consent to the redemption, it would deprive the landlord of the power to have the whole rent or none redeemed, and at any later stage it would be made, not for the primary object of the whole proceeding—redemption, but for the secondary object—fixing a fair rent, which is only consequential on the refusal to consent to redemption. In short, the appellant's contention is that the Act of 1896, section 7 (3), may be used to *create* a rent which may be fixed as "a fair rent" and then redeemed, whereas the Act of 1891 gives no power to fix the rent of any holding, unless and until the landlord has first refused to consent to redeem the contract rent reserved out of that same holding.

Mr. Justice Bewley seems to think it "natural" and "clear" that sect. 5 (1) and sect. 7 (1) of the Act of 1896 apply to proceedings under the Redemption of Rent Act, 1891, and he anticipates "no difficulty in applying these provisions, whether a rent is being redeemed, or, in default of the lessor's or grantor's consenting to the redemption, a fair rent is being fixed." We have difficulties and doubts enough in this case in dealing with sect. 7 (3), and we have no desire to involve ourselves in more. We, accordingly, express no opinion, one way or the other, upon other clauses, where the debateable expression—"the Land Law Acts" has a different context. At the same time, there appears to us to be immense difficulty in holding that the same words have different meanings, not only in different sections, but in different sub-sections of the same section. Sect. 5 (2) contains some words which seem to bear strongly in the direction of supporting Mr. Justice Bewley's decision upon sect. 7 (3). I refer to the words "the Court may, if they are of opinion that, *apart from the fixing of a fair rent*, the separation of the property into two parts *will not diminish the value of the landlord's interest therein*, direct that that part shall henceforth be . . . a separate holding." There is an analogous clause in sect. 7 (3), and it is hard to see how the value of the landlord's interest in both parts of the fee-farm holding now before us could fail to be diminished, "apart from the fixing of a fair rent," if redemption could be forced upon the landlord as contended by the tenant. This is an additional reason for believing that the

framers of both these sections were thinking only of the fair rent jurisdiction, and of occupying tenants, and either never thought at all of the Redemption of Rent Act, 1891, or did not intend that either of these sections should apply to it. This conclusion is fortified by observing, as I have already done, that, in every case under the Act of 1891, the rent which the landlord is to have the option of consenting to redeem, must be "a full agricultural rent"; the person who alone can put him to exercise that option, under peril of having a "fair rent" fixed, must be "in *bona fide* occupation" of the holding out of which that full agricultural rent issues.

On the whole, though with much difficulty and doubt as to the real intention of the legislature, or rather with much doubt whether the Redemption Act was thought of at all, we affirm the decision of the Land Commission that sect. 7 (3) does not apply to a redemption of rent under the Act of 1891. We think it safer to hold that the new powers to divide property, to treat sublet portions of land as separate holdings, to apportion reserved rents, and to fix fair rents on remainders of property held under demises, cannot be extended to such cases as the present, where their effect would be to enable landlords and tenants to redeem, at the public expense, rents which would not otherwise be within the Land Acts. We cannot interpret the Act of 1896, sect. 7 (3), as giving to either landlord or tenant, or to both of them, the power to divide a holding which is partly outside the Land Acts, and which, as a whole, is held at an irredeemable rent, so as to make either the whole, or any part, of that rent redeemable. The difficulties are well stated in that portion of Mr. Justice Bewley's judgment in which he deals with sect. 5 (2) and sect. 7 (3). He says:— "How can these provisions be applied to the redemption of a rent? The only relief which they profess to give is to enable the Court to divide the property comprised in a demise into two parts; to apportion the existing rent between those two parts; to treat as a separate holding the part excluded from the Land Law Acts, either as being demesne land or as not being agricultural or pastoral, or as being an incorporeal hereditament, in the case of sect. 5, or the part excluded as being sublet, in the case of sect. 7, and to fix a fair rent on the remainder of the property. It was not, and could not be, contended in the present case, that in cases

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coming within either of the sub-sections referred to, a right to redeem the entire rent reserved by the lease or fee-farm grant would exist. If the property comprised in the lease or grant consisted of a farm and some houses in a country town or village, or a farm and the tolls of a fair, it could not be said that this property was a holding to which Part I. of the Act of 1881 applied, or that the rent payable was an agricultural rent, nor, in the case of a holding such as the present, coming within sub-sect. (3) of sect. 7, could the lessee or grantee be treated as being *bona fide* in occupation. It follows, therefore, that if a long leaseholder or fee-farm grantee can in such cases obtain any relief under the Land Law Acts, it must be restricted to the fixing of a fair rent on portion of the property, without any right of redeeming the rent, or that the right of redemption must be confined to the apportioned part of the rent. It would certainly be strange that a lessee or grantee, the nature of whose estate was such as to fall within the interests dealt with solely by the Redemption of Rent Act, and whose only right to make any application to the Court was under that Act, should, by virtue of the provisions of sub-sect. (2) of sect. 5, or of sub-sect. (3) of sect. 7 of the Act of 1896, be given none of the rights to which a lessee or grantee is entitled under the Redemption of Rent Act, but a different right outside that Act, and within the Act of 1881, viz. the right of having a fair rent fixed. On the other hand, if it was intended that in such cases a lessee or grantee should be entitled to redeem a portion of the rent reserved by the lease or grant, one might expect that some reference to such a right should be made in the provision under consideration. In neither of the sub-sections referred to is there any mention of any right of redeeming an apportioned part of the rent, or of any right in respect of what is termed 'the remainder of the property,' except the fixing of a fair rent thereon."

In face of this reasoning of Mr. Justice Bewley, it is impossible to avoid the conclusion that the appellant's argument is, at best, based upon guess work as to the meaning of obscure language, and upon inference as to the supposed scope of confused legislation. The *onus* lies on the appellant to show that the Act of 1896 has forced a new jurisdiction upon the Land Commission, and has

given to fee-farm grantees who are middlemen rights of redemption which they did not previously possess.

I conclude with an observation which strengthens the conclusion at which we have arrived. All the powers conferred by section 7, as well sub-section (1) as sub-section (3) are in terms discretionary. But there is a great difference in the mode in which the discretion is expressed. The leading clause of sub-section (1) opens with the words:—"For the purposes of the Land Law Acts, the tenant shall be deemed to be in *bona fide* occupation, &c." But this mandatory clause is controlled by this unqualified proviso: "Provided that—(ii.) the foregoing provisions of this section *shall not apply unless* the Court think it reasonable to entertain the application, having regard to the acreage of the holding, *and to any other matter which they think should be taken into consideration.*" In subsect. (3) the powers of the Court are conferred by the word "may," not "shall," and these powers are confined to "any case to which sub-sect. (1) of this section does not apply."

I am not suggesting that the Land Commission decided this case, or that we are doing so, on any discretionary ground. The decision is that there is no jurisdiction to entertain the appellant's application. But the discretionary wording of the clause tends to support the conclusion at which, with very great doubt and difficulty, we have arrived.

WALKER, L.J.:—

As the question involved in this appeal is finally disposed of by the judgment of Lord Justice Fitz Gibbon, with which the Lord Chancellor agrees, any opinion of mine is unimportant as regards the result.

I must say, however, that I entertain the gravest doubt whether a decision which excludes redemption of rent cases from the operation of the fifth and seventh sections of this amending Act of 1896 is in accordance with what was intended—I mean legally intended—by the words used.

I quite appreciate the great difficulty in which the Court is placed in attempting to apply those sections to the Redemption of Rent Act. We are given a definition of the Land Law Acts which includes it; but when we come to apply it we find either

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that the framers of the Act had no thought of its being made applicable, or that they had used language so obscure that any lawyer may well hesitate before deciding that the context does not require that the fifth and seventh sections are not applicable to redemption of rent cases. But, on the other hand, the Redemption of Rent Act is not only incorporated by the definition, but the Act of 1896 contains provisions amending it, and though it is true that the opportunity for redemption precedes the fixing of fair rent, the latter relief is the one really sought and almost universally applied.

As to interference with rights and inconvenience it is difficult to see how these can exist in any greater degree in the case of a holding held under a lease for lives within the provisions of the Act of 1887, and yet it is plain that in such a case there must, or (when discretion comes in) may be a separation, and a fair rent fixed on the remainder of the holding. Again, speaking for myself, I think it is clear that part of sect. 5 and part of sect. 7 must apply to redemption of rent cases. No doubt the provisions as to fixing a fair rent occur before the general words which make the Land Law Acts applicable, and this is in my mind the main difficulty of construction; but then these general words are large enough to include the right of redemption, and I am not myself able to see in that any conclusive reason for cutting down their effect. The separation of the part sublet must, in fact, take place before either fair rent or redemption could be made applicable, and—once this separation, allowed for getting rid of the subletting which creates a bar, takes place—then, as regards what is left, redemption and fair rent may proceed. Therefore in this last puzzle which has arisen on the Act I should be disposed to take a different view from my colleagues; but the matter is now settled by their decision, which accords with the view of Mr. Justice Bewley.

Solicitor for the grantor: *Kilkelly.*
Solicitor for the grantee: *C. F. Falls.*

G. Y. D.

COYNE *v.* TWEEDY (1).

(1895. No. 8146.)

Q. B. Div. 1896.
Feb. 20, 21, 24, 28.
Appeal.
May 4–7.

Peace officer—Duty to preserve the peace—Acts committed in the execution of such duty.

In 1891 the parish of Killannin, of which the plaintiff was then priest, was transferred from the Roman Catholic archdiocese of Tuam to the diocese of Galway. The plaintiff, who disputed the right of his superiors to make such transfer without his consent, appealed to Rome; and went to Rome, and there remained from 1891 to 1894 prosecuting his appeal. He returned unsuccessful to Killannin in January, 1894, and found that in the meanwhile another clergyman (C.) had been appointed parish priest in his stead by the Bishop of Galway, and had been performing the duties of that office. On Saturday, the 9th February, the plaintiff, with a large body of parishioners, his sympathisers, took and held possession of the parish chapel.

On the following (Sunday) morning the defendant, a district inspector of constabulary, proceeded, in obedience to instructions from headquarters, to the chapel, and took command of a body of constables, who had been sent there at an earlier hour. Shortly after his arrival C., with another large body of the parishioners, appeared on the scene. C. stated that he was the parish priest, and asked the defendant to break open the chapel door, or to assist him in gaining admission. The defendant refused to do so, and awaited events. C.'s party opened the door with a sledge-hammer, and C. and some of his followers entered the sacristy. The defendant and some constables entered after them. An excited altercation ensued between the plaintiff and C., the latter demanding to pass from the sacristy into the chapel, while the plaintiff opposed his right to do so. In the end the plaintiff pushed C. roughly back; a rush was immediately made at the plaintiff, and a general riot would have resulted, had not the defendant (who till then had remained a passive spectator) interfered, with the object of preventing the impending riot, and removed the plaintiff from the chapel precincts. In an action for assault and trespass, the jury found that such removal was reasonable and necessary to prevent a breach of the peace:—

Held, on new trial motion, by the Queen's Bench Division, and, on appeal, by the Court of Appeal, that, even assuming the plaintiff to have been legally in possession of the chapel, the defendant had done nothing exceeding his duty as a peace officer, that the finding of the jury was reasonable, and that the action was untenable.

(1) Before SIR PETER O'BRIEN, L.C.J., and O'BRIEN and GIBSON, JJ.

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COYNE v. TWEEDY.

NEW TRIAL MOTION in an action for assault and trespass.

In 1875 the plaintiff was appointed parish priest of Killannin in the county of Galway and Arch-diocese of Tuam by Dr. Mac Hale, the Archbishop of the diocese, where he remained until 1891. Dr. Mac Hale died in 1882, and Dr. M'Evilly succeeded him. On the 1st January, 1891, the plaintiff received a document dated the 30th December, 1890, from Dr. M'Evilly, communicating a decision of the Holy See dated the 13th December, 1890, that Killannin had been separated from Tuam and annexed to the diocese of Galway. On the 4th January, 1891, the plaintiff called on Dr. M'Cormack, the Bishop of Galway, and objected to the parish being transferred without his consent, and announced his intention of appealing to Rome against the transfer. It was agreed that Dr. M'Cormack should send a priest to take charge of the parish during the plaintiff's absence, and accordingly the Rev. Father Kieran came to the parish. On the 17th January, 1891, the plaintiff went to Rome, where he remained until January, 1894, having during this period prosecuted his appeal, but without success. In the meanwhile the chapel door was nailed up on Easter Sunday, 1891, and remained closed until October, 1893. By a decree of the Propaganda dated the 21st May, 1894, the plaintiff was suspended from acting as parish priest of Killannin. The letter of suspension from the Bishop of Galway was handed to the plaintiff on the 9th July, 1894, but he refused to receive it, as he stated that it did not come from his own bishop. On the 2nd September, 1893, Father Conroy was appointed parish priest of Killannin by collation. On the 29th June, 1894, the plaintiff returned to Ireland, and found Father Conroy in occupation of the chapel. On the 9th February, 1895, the plaintiff went to the chapel accompanied by a large number of his parishioners; the door was only slightly fastened, and one of the parishioners having pushed it in, they all entered. They put on their own locks and bolts, and remained there most of the day. On Sunday, the 10th February, 1895, the plaintiff went to the chapel a few minutes before 8 o'clock in the morning, and entered the chapel by the sacristy door. The chapel was then nearly full, but the people were peaceable. The plaintiff commenced to prepare to say Mass; he went to the High Altar, and prepared the chalice

and vestments, and returned to the sacristy for the purpose of vesting; the door from the chapel to the sacristy was open; that from the sacristy to the outside was closed, and locked. The plaintiff deposed that when about to vest, he heard an alarm, and looking through the sacristy window saw a force of 50 or 60 police approaching. They marched by the chapel, and to the outer door of the sacristy. Some one outside called to open the door, and immediately afterwards it was broken in by a sledge. Three or four police came in at once, and the defendant, a District Inspector of the Royal Irish Constabulary with them; the defendant ordered the police to remove the plaintiff. The plaintiff protested, stating that he was parish priest, and offered to produce documents to prove his title to the office. The defendant refused to look at the documents, and ordered the police again to remove the plaintiff, which they did.

The evidence given by the defendant conflicted to some extent with that given by the plaintiff. He was stationed at Spiddal, in the county of Galway about twenty miles from Killannin, and on the evening of the 9th February he received a telegram, in consequence of which he proceeded the following morning to Killannin, where he was met by 32 constables. He marched the men up to the chapel, and found the doors on the north-east sides barricaded, but the chapel was full of people. Father Conroy then appeared, accompanied by about 100 people. A conversation then took place between the defendant and Father Conroy, in which the latter stated that he was parish priest, that he had come to perform service in his chapel, that he desired to enter, and that Father Coyne's followers were inside. He invited the defendant to gain admission for him, but the defendant refused; he then asked the defendant if the defendant would protect him if he entered the chapel; and the defendant said that if he entered, the defendant would not allow any one to assault him. Father Conroy then rapped at the sacristy door, and demanded admission, and the door not being opened he directed one of his men to break it open. The door was broken with a sledge-hammer, and Father Conroy and five of his followers entered; the defendant and four constables also entered. The plaintiff was standing at the door leading from the sacristy into the chapel. The plaintiff and Father

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Conroy then commenced arguing as to which of them had the right to officiate, and a number of their followers were close round, many of whom were armed with sticks, and all of them excited and showing signs of violence. Father Conroy asked the defendant to remove the plaintiff, which he refused to do. Father Conroy then tried to pass the plaintiff so as to enter the chapel; the plaintiff put out his hand and shoved Father Conroy with so much force that he came back against the defendant. There was then a distinct rush made at the plaintiff, but the defendant stepped between the plaintiff and the crowd, and one of the police did so too, and the other constables went to the door to keep back the crowd. The defendant asked the plaintiff to leave, which the plaintiff refused, and then the defendant placed his hand on the plaintiff's arm, and a constable placed his hand on the plaintiff's other arm and removed him.

The Lord Chief Baron, before whom the action was tried, left two questions to the jury.—1. Was what was done to the plaintiff by the defendant and by the constable acting under his directions on the 10th February, 1895, reasonable and necessary to prevent a breach of the peace? 2. Was the plaintiff possessed of the church of Killannin at the time of the acts complained of? The jury answered the first question in the affirmative, and the second in the negative. On these findings the Lord Chief Baron entered judgment for the defendant.

The plaintiff now moved for a new trial on the ground of misdirection.

Drummond, *Q.C.*, *Taylor*, *Q.C.*, and *Ennis*, for the plaintiff.

The Rt. Hon. The Macdermot, *Q.C.*, *Sullivan*, *Q.C*, and *Hume*, for the defendant.

Cur. adv. vult.

Feb. 28.

SIR P. O'BRIEN, L. C. J.:—

This case, the trial of which before the Lord Chief Baron occupied several days, and the argument in reference to which before us occupied a considerable time, ultimately resolved itself into a very narrow compass. The sole question ultimately debated before us was whether the defendant Tweedy, who admittedly

assaulted the plaintiff in the manner and under the circumstances I shall hereafter indicate, established a justification for so doing by reference to the doctrine which was applied, and received authoritative recognition, in the well-known case of *O'Kelly* v. *Harvey* (1). That case affirmed the proposition, that if the removal of a person from any given position is necessary to prevent a breach of the peace, a magistrate or peace officer, who honestly and reasonably realises that necessity, may, nay ought to, remove that person, and does not in so doing incur liability for an assault, and that this is so, though the person whose removal is essential to the preservation of the peace, is innocent of all offence, and though it may be the action of wrongdoers that creates the necessity for the removal. This is the effect of the decision in the case I have referred to. The principle upon which it rests is to be found in the great concern of the law for the interest of the general community; and, in subserving those interests, it apparently subordinates the claims of individual liberty to consideration of the public good. The law says very peremptorily to those it entrusts with the preservation of the peace, that the peace must not be broken—that they, so far as in them lies, must take all steps they reasonably believe to be necessary to preserve the peace. The case of *O'Kelly* v. *Harvey* (1) was conversant with the action of a magistrate, but a district inspector's responsibility as a peace officer is at least commensurate with the duty of a magistrate, so far as relates to the preventing a breach of the peace.

When pronouncing the unanimous judgment of the Court of Appeal in that case, the late Mr. Law, who was then Lord Chancellor, after referring to the circumstances of the particular case, said: "Under such circumstances the defendant was not to defer action until a breach of the peace had actually been committed. His paramount duty was to preserve the peace unbroken, and that by whatever means were available for the purpose. Furthermore, the duty of a justice of the peace being to preserve the peace unbroken, he is, of course, entitled, and, in fact, bound, to intervene the moment he has reasonable apprehensions of a

(1) 10 L. R. Ir. 285; 14 L. R. Ir. 105.

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breach of the peace being imminent, and, therefore, he must in such case necessarily act on his own reasonable and *bona fide* belief as to what is likely to occur. Accordingly, in the present case, even assuming that the danger arose altogether from a threatened attack of another body on the plaintiff and his friends, still, if the defendant believed, and had reasonable grounds for believing, that the peace could only be preserved by withdrawing the plaintiff and his friends from the attack with which they were threatened, it was, I think, the duty of the defendant to take that course." This is the language of Lord Chancellor Law. It shows that a person may be removed from a position, his continuance in which would be likely to lead to a breach of the peace, and this, though he be innocent of all offence. Speaking of the very peremptory duty which devolves on a constable, the late Mr. Justice Hayes, in giving judgment, in the case of *Humphries* v. *Connor* (1), which is known as the "orange lily case," said, "A constable by his very appointment is by law charged with the solemn duty of seeing that the peace is preserved. The law has not ventured to lay down what precise measures shall be adopted by him in every state of facts which calls for his interference, but it has done far better; it has announced to him, and to the public over whom he is placed, that he is not only at liberty, but is bound to see that the peace be preserved, and that he is to do everything that is necessary for that purpose, neither more nor less. What he does he does upon the peril of answering to a jury of his country, when his conduct shall be brought in question, and he shall be charged with exceeding or falling short of his duty." This is the language of the late Mr. Justice Hayes. The measure, then, of the defendant's duty is doing what was, and what he believed to be, reasonably necessary for the preservation of the peace. A jury has found a verdict in his favour. The propriety of that verdict has been challenged in the argument before us; and we have now to determine whether there are any legal grounds to support that challenge. This involves a consideration of the material facts, and I turn to them with regret, for they create a most painful impression.

(1) 17 Ir. C. L. R. 1.

It appears that the plaintiff was parish priest of a parish named Killannin in the county of Galway, in the archdiocese of Tuam, and it was thought expedient by the ecclesiastical superiors of the plaintiff, namely, by the Archbishop of Tuam and Bishop of Galway, that the parish of Killannin should be transferred from the archdiocese of Tuam to the diocese of Galway. His Holiness the Pope, with whom, according to the law and ordinances of the Roman Catholic Church, the jurisdiction to transfer rested, issued a protocol on the 13th December, 1890, which purported to transfer the parish in question to the diocese of Galway. I use the word "purported" because, having regard to the decision in the case of Mr. O'Keeffe and his Eminence the late Cardinal Cullen (a decision which it is my duty to follow, but as to the correctness of which I desire to express no personal opinion), it was not contended that any protocol or decree of the Pope had any legal sanction in this country, even as between members of the Roman Catholic Church. The protocol of his Holiness the Pope was dated 13th December, 1890. Some time after this, viz. on the 7th January, 1891, the plaintiff went to Rome to appeal against the protocol or decree of the Pope. He did not, though he remained for some years in Rome, succeed in reversing the decree which had been made for the transfer of the parish; and having failed in his object he returned to Ireland on the 29th June, 1894. In the meantime a decree, dated the 21st May, 1894, and issued by the Sacred Propaganda, purported to deprive the plaintiff of his benefice for disobedience, in not having returned to Galway to discharge his ministrations as a priest. After his return to Galway in June, 1894, Dr. Mac Cormack, the Bishop of Galway, issued on the 6th July, 1894, an instrument under his hand, which purported to suspend the plaintiff *ab ordine et officio*.

This alleged suspension was issued by reason of the plaintiff's conduct in reference to Dr. M'Evilly, the Archbishop of Tuam. The next date to which it is necessary to refer is Saturday, the 9th February, 1895, the day before the occurrence which is complained of in this action took place. It will be seen that at this time the plaintiff, so far as the action of his ecclesiastical superiors could effect it, was deprived of his benefice and suspended from

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the discharge of his ministerial functions. He was deprived of his benefice and suspended *ab ordine et officio*, and for eighteen months prior to the 9th February, 1895, Mass had been celebrated in Killannin Chapel by the Rev. Mr. Conroy, who was appointed to do so by the Most Rev. Dr. M'Cormack. What, then, was the action of the plaintiff on Saturday, the 9th February, 1895? Though deprived of his benefice and suspended from his ministerial functions, so far as the rules and ordinances of the Roman Catholic Church could effect that result, he nevertheless proceeded on that day, with what the Lord Chief Baron rightly described as a mob of some 80 or 100 followers, to take possession of the church so as to be in a position to celebrate Divine Service there on Sunday morning, and to prevent the Rev. Mr. Conroy, the nominee of the Bishop, from so doing. After the plaintiff and his followers entered the church on Saturday, the 9th, they proceeded to put locks and bolts on the doors, and the plaintiff in his cross-examination distinctly avowed that he intended to oppose by force if necessary the entrance of Father Conroy and his followers. In fact, he, a suspended priest, was, to use his own language, determined "to hold the fort," the appellation by which he styled the chapel, against his Bishop's nominee. This was the spirit and these were the surroundings in which on Sunday, February the 10th, he approached the altar to offer up the sacrifice of the Mass. I would wish indeed to refrain from all comment; I do so as much as possible; but this I must say, for the purposes of my judgment, that it appears to me, however much the plaintiff may now protest to the contrary and however much he then endeavoured to restrain himself, he was on that occasion in a state of very great mental excitement, and that, if danger of a collision existed between his followers and those of Father Conroy, his emotional and excited condition was more calculated to precipitate than to prevent it. He knew, too, as the fact was, and as he had admitted he had heard, that his followers and those of Father Conroy had already come into conflict, and that there had been scenes of violence between them at fairs and markets with reference to this very chapel, and the right to read Mass therein. I have stated what was going on within the chapel on the morning of Sunday, the 10th February, 1895. I now turn to the condition of things without the chapel;

Father Conroy, the Bishop's nominee, who had said Mass in the chapel for the preceding eighteen months, had heard that the plaintiff and his followers had taken possession of it, and appealed to the defendant Mr. Tweedy who is a District Inspector, for assistance. Mr. Tweedy stated he would give him no assistance in effecting an entry into the chapel, but that he would preserve the peace. Father Conroy and his followers, numbering about 140 men, came to the chapel on the morning of Sunday, the 10th February; they found it barred against them. The occasion was fraught with the most imminent peril to the public peace. A body of police, some 25 in number, under command of Mr. Tweedy, was present. A conversation then took place between Rev. Mr. Conroy and the defendant. As there was much controversy as to the effect of what Mr. Tweedy said on that occasion, I think it better to give his very words. He said :—"Father Conroy told me he was the parish priest and that he had come to perform service in his chapel and wanted to get in, and that Father Coyne and a party of Father Coyne's followers were inside, that they were very desperate men, and that some of them were said to be armed with revolvers, and he asked me would I obtain admission for him into the chapel. I said I would not, that I was only there to prevent a breach of the peace. He then asked me would I protect him if he entered the chapel; I told him if he entered the chapel I would not allow anybody to assault him." This was the conversation which took place on the occasion I have referred to between the Rev. Mr. Conroy and the defendant Mr. Tweedy. Subsequent to this conversation one of the followers of the Rev. Mr. Conroy, and by his direction, broke open the sacristy door, permission to enter having been denied to them, and Father Conroy and his followers entered the sacristy. I will read from Mr. Tweedy's evidence his description of what occurred. The jury heard this evidence, and it was for them to say whether they believed it or not. It was as follows. It is reported as question and answer were put and given :—

"Father Conroy ordered one of his men to break open the sacristy door, and one of his men did so with a sledge. Did you hear rapping at the door previously to that? Yes, he had gone to the door, and asked for admittance, and there was no answer.

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The door was then broken open. Who burst in first? Father Conroy, and about five of his followers. Did Father Conroy and those followers precede you into the chapel? They did; I followed them with four of my men whom I had previously told off for the purpose. When I entered the sacristy I found Father Coyne standing in the sacristy at the door leading from the sacristy into the chapel. There were a number of his followers in the chapel. I could only see those of his followers who were right opposite the door. A man behind Father Coyne had an iron bar in his hand, and I subsequently saw several sticks. Father Conroy went up to Father Coyne and asked him to allow him to pass into the chapel. Father Coyne said he would not allow him in, that he was the parish priest. Father Conroy then began arguing with Father Coyne, each trying to persuade the other that they had the right to go in. Were their respective followers close up at the time? They were. After the police entered a great number of Father Conroy's followers came in before we could stop them, into the sacristy. While these gentlemen were arguing, what was the attitude of the followers? The attitude of both followers was very violent, and very excited. They were challenging one another apparently, though they mostly spoke Irish. You could understand at any rate that they were challenging one another? Yes, I could understand 'jumpers'; they were calling each other 'jumpers.' Was the attitude of both parties threatening? Yes. Father Coyne and Father Conroy were arguing for some time, and then Father Conroy turned to me and said, would I remove Father Coyne, that he would not allow him into the chapel. I told him I would not interfere. Father Conroy then turned round and tried to pass Father Coyne and get into the chapel, and then Father Coyne put out his hand and shoved Father Conroy with so much force that Father Conroy came back against me and stood on my foot. When Father Conroy's supporters saw that Father Coyne had done this there was a distinct rush made at Father Coyne by the followers of Father Conroy. What was the next thing that occurred? When I saw that I stepped between the crowd and Father Coyne, and one of the policemen did the same. Was that to protect him? Yes, and other police went to the door to keep back Father Conroy's followers who were making a

rush into the sacristy. I saw the police forced back; there were three police at the sacristy door, and two at the other. Five police had come in, though I told only four to come. Three of the police were preventing the crowd from coming into the chapel, and two were guarding the sacristy from the crowd outside. What was then the demeanour of the followers? Their intention was apparently for those behind to push those in front against Father Coyne, and if that had been done it would have caused a riot. What did you then do? I asked Father Coyne to allow Father Conroy to pass; he refused. I then told him the state of the crowd was getting very serious. Was it getting very serious? It was, and I told him there would be a riot and bloodshed if he did not allow Father Conroy to pass. I asked him several times to allow him to pass, and every time he refused. I then told him I would be obliged to remove him from the sacristy. I asked him would he leave? He said he would not—that it was his chapel; I then put my hand on his arm and a policeman put his hand on his other arm, and we led him towards the outer door of the sacristy. Father Coyne, when he had got about half way, stopped, and took out some papers, and said he had a lease of the church, and asked me to look at it; I told him I could not look at it. I said that it was as much for his own safety as anything else that I was removing him. I told him the state of the crowd was such that it was as much for his own safety as for that of others that I had to remove him from the sacristy. In your opinion was it necessary for his own safety to remove him from the sacristy? Absolutely necessary. In your opinion, from what you saw of the state of the crowd, was it necessary to remove him in order to preserve the peace? Absolutely necessary. Was it for the purpose of preserving the peace you removed him? It was, and I told Father Coyne that."

This was the evidence of Mr. Tweedy, and it was, as I said, for the jury to determine what credence they should attach to it. Their finding shows that they believed it, for they found, in answer to the first question put to them by the Lord Chief Baron that what was done to the plaintiff by the defendant, and by the constables, acting under his directions, on the 10th February, 1895, was reasonably necessary to prevent a breach of the peace.

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The *bona fides* of Mr. Tweedy was not questioned. He did then, in the opinion of the jury who heard the case, only what was reasonably necessary to prevent a breach of the peace. This, according to the cases I have cited, *O'Kelly* v. *Harvey* (1), and *Humphries* v. *O'Connor* (2), was the measure of his duty and the criterion of his justification. The law has clearly declared its doctrine on the subject; and the finding of the jury brings the defendant within the protection of the law. But it has been much pressed by Mr. Drummond and Mr. Taylor, that the defendant's statement to the Rev. Mr. Conroy that he would protect him from assault if he entered, must have had the effect of encouraging the reverend gentleman and his followers to enter the chapel, and that, therefore, the defendant is in the eye of the law to be regarded as participating in all that occurred; that, in fact, he was the cause of it, and that the necessity for his action in reference to the plaintiff was created by himself, and that as dereliction of duty created the necessity for his action, he cannot rely upon that necessity for his defence. We cannot take this view of Mr. Tweedy's action. It was certainly open to the jury not to take this view of it. It was open to them, taking all the circumstances into consideration, what was said as well as done by Mr. Tweedy, to say whether his action was reasonably necessary. He did no act calculated to encourage the Rev. Mr. Conroy to break into the chapel, and even if he made a mistake in allowing the sacristy door to be broken open, that certainly did not absolve him from his paramount duty to preserve the peace. This duty he at all times owed the public; and if he made a mistake in allowing a threatening mob to break open the sacristy door, he would have erred more grievously if he had not interfered to preserve the peace when a collision seemed imminent. We think then that the jury was justified in answering the first question put to them as they did, and as the answer to that question was stated by the Chief Baron, and expressly admitted by counsel, to decide the whole case, we refuse the motion to set aside the verdict with costs.

(1) 10 L. R. Ir. 285; 14 L. R. Ir. 105. (2) 17 Ir. C. L. R. 1.

O'BRIEN, J. :—

In an action for an assault and trespass, the defendant has pleaded, in substance, to both forms of complaint justifying on reasonable grounds of apprehension of a breach of the peace, and to the trespass a separate defence denying the property. Two questions were left to the jury: first, whether the acts of the defendant were reasonable and necessary to prevent a breach of the peace; secondly, whether the plaintiff was in possession. If the former question were found for the defendant, it was an answer to all the causes of action. If for the plaintiff, it was necessary to determine the second issue, in order to entitle him to further damages for the trespass. The case arose out of the disputed possession of a Catholic church; and the circumstances of the plaintiff's position are not immaterial—as they may be considered to reflect both upon the materials that existed for a judgment on the question, upon the danger to the public peace, and upon the nature of the possession at the same time—and are, therefore, evidence on both the issues. The plaintiff was deprived of his parish by a sentence of the Pope, and was also suspended as a priest by the Bishop of Galway, on grounds admitted to be canonically within the scope of his authority. He appealed to the Pope against a decree annexing his parish to the diocese of Galway, and was absent over three years in Rome; and it was stated that, after his deprivation and suspension, he had celebrated Mass in his own house, married people in his own house also, with the grave social consequences attaching by law to such an act. The defendant was said by Mr. Taylor to have acted precisely as if he were attending an eviction; and the resemblance of the situation might, perhaps, be conceded, without prejudice to his legal position from the absence of the credit for legality attaching to the execution of the Queen's writ. But the observation leads us to complete the analogy. For the plaintiff succeeded in reproducing, in the successive scenes of a drama to which we are not entirely unaccustomed, a perfect example, of which those concerned may take note, of the facility of transition from one form of resistance to authority to another. The Rev. Mr. Coyne was "evicted." The Bishop of Galway took the evicted parish. The people were expected to "keep the fort" against him. They were

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told to have their pockets empty on Easter Sunday, as if it were rent they were to pay. They were extolled for the manœuvre, by which persons were deprived of Mass on the great day on which the Christian world commemorates, with reverence, the divine witness of man's immortality.

The rightful tenant returned after years, during which the church was left by him to take care of itself. He retook possession. He manned the fortress. Preparations were made for a pitched battle. And the end is an action against the police for not allowing the parties to murder each other—all quite in the order of approved precedent. These are the facts to which we have to apply the refinements of the law concerning possession and the principle of constitutional liberty—the liberty, in this case, of persons to kill and slay each other in the house of God; to pollute the temple with blood; and, perhaps, to light the altar with the flash of the revolver. We might find some ground of extenuation for the action of the Rev. Mr. Coyne, if not of sympathy, if he had suffered any kind of injustice; if it had been his misfortune to live under the frown of unforgiving power; if he had made a kind of pilgrimage of justice to Rome, and turned back from his long and vain exile the victim of unredressed wrong, and of the oppression that is said sometimes to make a wise man mad. But that was not the case at all, as far as we have any proof. The act of which he complained—the change of the diocese—did not deprive him of any personal right. He objected, Dr. Mac Cormack says, to be banished from his diocese; not, we may suppose, from any excess of attachment he felt to the authority from which he was about to be separated. That is, he objected to the parish being banished, though he was still to remain the parish priest. The change in question, the archbishop tells us, had been recommended so long ago as 1812, and again in 1850, and was absolutely beneficial to the parish. He was allowed to remain not less than three years away from his cure of souls. What would be said, in the case of any temporal office, with respect to such a prolonged absence, even if not in the prosecution of a hostile complaint against a person's superiors? The formal ground taken up by the Rev. Mr. Coyne against the change was that it could not be made without his consent; and he

says that Dr. Mac Cormack admitted that objection. The bishop denies this statement with an expression of surprise, that will be common to anyone, even the least acquainted with the constitution and discipline of the Catholic Church. We have the distinct authority both of the archbishop and the bishop that no such consent is required, and it would be an extraordinary thing if it were, though in ordinary cases it is certain the parish priest would be likely to be consulted. The change is not made by the Archbishop, who only recommends, but by the Pope; and, therefore, we see how high the plaintiff's claim of his right to object reaches. The suspension was after his return, and for a cause not questioned to be sufficient in discipline—for letters and publications containing charges of such an intolerable character that it is really difficult to see what kind of relation between a bishop and priest could subsist consistently with them.

The evidence of Archbishop M'Evilly and Dr. Mac Cormack was not referred to in the discussion, because no question was left to the jury to which it remained to be applied; but the case itself was avowedly an accusation against them; and it is often but imperfect justice when a merely legal result follows a public trial. Yet all that could be made upon that evidence, by the strictest question, and by a use of logical subtlety that did not at least fail in perseverance, was to cast doubt on what was not in dispute—to impugn the evidence of facts which the plaintiff did not himself deny—to insist on notice of what he admitted he knew—to establish, nevertheless, that there was the strictest warrant in the laws of the Catholic Church for the proceedings taken in his regard; and to leave an impression on any impartial mind, not willing to yield to the prejudice that has survived from a memorable legal example, affording a lesson what not to imitate but to avoid, that there was not in the difference of the methods of the common law and of the canon law as expounded and applied in this case, any difference in the care taken of right, or any crevice into which error or wrong could creep. And that conviction must be impressed on the mind of anyone, whatever feeling the common infirmity of human nature may lead us to entertain concerning the hardest fate of all in the world—though just, yet it may be hoped in charity not perpetual—the fate of a priest,

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banished not from his diocese but from the altar, and to be stripped of the sacred functions in which his life had passed.

Upon the facts it was impossible that the jury could come to any conclusion but that there was in the mere situation the most imminent danger to the peace; and the case against the verdict now stands upon the single and definite point, that the defendant was deprived of that defence, for the reason that the state of things out of which the danger arose was brought about by himself. It is difficult to see in what way this element could be imported into the rule of law laid down in *O'Kelly* v. *Harvey* (1) as to the duty and right of an officer of the law, except in the view presented by Mr. Taylor—that the allegation in the defence that the act was necessary was disproved, if he could otherwise have prevented the breach of the peace. This argument was, of course, met by the obvious answer that, however the officer acted in the beginning, his duty to preserve the peace at any stage still remained; and, if that were his duty, in what way could the right to plead it in his defence be separated from his act. If such a result were to follow, the act would be wrong, and might be his duty at the same time. In my opinion it made no difference whatever whether or not the crowd outside was an illegal assembly, though I do not consider it possessed that character, or whether Mr. Tweedy ought to have prevented them from entering the church. I do not entertain the opinion he was called upon to do so; and I do not agree that there was any blame to be attached to him for the omission. He saw a number of persons coming to the church, at the usual hour, on Sunday, though a great many of them in a body, in the company of the clergyman whom he knew to have been in the habit of saying Mass for a long time before, but who were likely to meet with opposition or resistance of some kind. But he knew also that he had a force in hand sufficient to arrest the danger when it arose. He was there simply to keep the peace; if he had taken upon himself to adopt the opposite course, he would have put himself in a position that would have exposed him to an action at the other side, with the necessity of pleading the same defence, and, perhaps, with somewhat less assurance of success.

(1) 10 L. R. Ir. 285; 14 L. R. Ir. 105.

But let us, for a moment, see what all the exaggerations about the defendant's conduct come to. Take the evidence of Constable Hill, which was relied on for the plaintiff: "After he went up to the door," he says, "Father Conroy arrived, and he asked Mr. Tweedy would he break open the door for him. Mr. Tweedy said he would not break open the door—that he was there only to preserve the peace. He asked him then, if he broke open the door would he protect him inside. Mr. Tweedy said he would; and then Father Conroy directed one of his men to break open the door, and he broke it open with a sledge." The District Inspector's own account is this: "Father Conroy told me he was the parish priest, and that he had come to perform service in his chapel, and wanted to get in, and that Father Coyne and a party of Father Coyne's followers were inside, that they were very desperate men, and that some of them were said to be armed with revolvers; and he asked me would I obtain admission for him at the chapel. I said I would not, that I was only there to prevent a breach of the peace. He then asked me would I protect him, if he entered the chapel. I told him that if he entered the chapel, I would not allow anybody to assault him. That was the conversation."

In any part of the world but that in which we are—where all parties appeal to the law in turn against their opponents, and assail the law—would any one dream of holding an officer of the law liable under such circumstances? Take it that Hill's words were the exact account—that he would protect him—not that he would not allow any one to assault him; and that this was even the object with which he entered. That could make no difference in his legal position. He could not protect him without in the same act preventing a breach of the peace. What difference did it make that he did not prevent the breaking the door. The officer was not in a position to know whether that was a criminal act or a violation of a civil right. When the party entered, the danger entered with them, and the police followed it. Their proper place and time were where and when the danger to the peace existed. I have assumed that the crowd outside was an unlawful assembly, though I rather think it was not. I will next assume the crowd inside was not an unlawful assembly, although I think there is strong evidence that it certainly was. Or, let us take the strongest

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supposition of all—that the one body came merely to protect Father Coyne, and the other to protect Father Conroy, against their respective opponents. They could not both have possession of the same altar, a collision was inevitable, and a breach of the peace. But Mr. Drummond says that the inspector himself broke the peace when he stood by and saw the door forced—that it was a continuous breach of the peace, and that he could not excuse himself for trying to prevent what constructively he did himself. Do you mean by omission? said one of my colleagues. Yes, said Mr. Drummond. The difficulty of making out such an extraordinary proposition and the evident uncertainty in the mind of counsel as to the legal shape into which it could be forced, led to the accusation against the defendant being shifted from omission to positive commission by sanction which was an act in law. In other words it was contended that, by refusing to open the door, and saying he would protect the Rev. Mr. Conroy if he entered, the defendant caused him to enter, and that, if any other person committed a breach of the peace afterwards, that was in legal effect the defendant's own act. This is a view of legal consequence and responsibility to which I do not see my way to accede. The learned Chief Baron left the question of possession as one of fact to the jury, though he considered himself all the same bound by the decision in the case of *O'Keeffe* v. *Cullen* (1). Contrary to his own opinion, he assumed that the plaintiff was still parish priest. He did not, however, take that as determining the legal possession—namely, that possession which was sufficient against a stranger not having any title—though I do not understand, on the other hand, that he excluded it as evidence on the question of possession in fact. I should perhaps have considered it was not any such evidence, and that there was not any evidence whatever, on the admitted facts, of any such possession as could have entitled the plaintiff to maintain trespass. Of course, no jury in their senses could find that a church in which another person had exercised the authority and fulfilled the functions of parish priest for a year and a-half, was in the possession of a suspended priest who was "holding the fort," with all the show and the arrangements of military defence.

(1) I. R. 7 C. L. 319.

We are bound to follow *O'Keeffe* v. *Cullen* (1) if it affects the question, having before our eyes at present a lesson of the inconvenience of insubordination, and we must accordingly give the benefit to a Catholic priest of a law proscribing his own religion, and denying the jurisdiction of the Head of his Church to whom he himself had appealed. That case, however, has not reached the supreme tribunal, as the Rev. Mr. Coyne did; and when it does, perhaps the weight of the arguments on either side, particularly those presented in the distinguished judgment of the late Mr. Justice O'Brien upon the status of a voluntary church., as laid down by the highest English decisions, and upon the effect of subsequent legislation on the statute of Elizabeth, may come to be re-adjusted with a different result. And when that event happens, we may receive some explanation of the curious consequence of not adhering to those decisions—in what manner the rights of a Catholic priest can subsist under this obsolete law without the engagements—how a person can be a parish priest for possession and not for suspension—how the power of appointment can exist in the same Church and not the power of removal. Mr. Drummond, however, assumed to stand on higher ground, with some consistency, even if with boldness—reverting to what he considered to be the law of the Church, before yet the Tudor ruler was. But I apprehend he will find much difficulty in tracing into the parochial system of the present day, by any kind of lineal succession, the traditions and discipline of the ancient Catholic church, in which benefice represented merely income, and vast property belonged to religious communities without being attached to individuals in any sense corresponding to the right of possession under the law of England. So far as my imperfect information on such a subject leads me, concerning a matter on which the common respect of Catholics for their religion excluded all question of right, a parish priest was always considered simply in the character of custodian of his church, having no defined relation to it in point of property. We meet some difficulty on the subject from the endeavour to force upon the system of Catholic discipline the analogies of temporal property that naturally survive out of

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the idea of a Church establishment. The rights of a parish priest are well known and defined. But freeholder is a word not usually applied to the position of a Catholic priest; his ideas are turned in a different direction. If he knows for what he is ordained his freehold is elsewhere. The priest has no property in the Church says St. Bernard, expressing not less the idea of law than of duty. Take Wolsey after his fall—his robe and his integrity to Heaven are all that he can call his own; and he is well, if, taking the lesson from him, and casting away the pride by which the angels fell, he can faithfully preserve them. From the consideration I have been able to give to the case, I have come to the conclusion that the law was kept absolutely straight by the learned Chief Baron, from beginning to end, in all that concerned the real question, and that The Macdermot has successfully maintained his engagement to show that in the event there was no error and no miscarriage.

GIBSON, J.:—

It is admitted that if the door had been broken before the defendant had appeared on the scene, the necessity of preserving the public peace would have been a complete justification for the defendant's action in entering the chapel and removing the plaintiff. The liability of the defendant is made to rest on his presence at the forcing of the door, which it is said was a criminal act that the officer was bound to prevent. Had the barrier which separated the opposing forces remained intact, the danger of hostile collision would have been obviated. The plaintiff therefore contends that the defendant cannot legally excuse himself for what was *prima facie* trespass and assault by a necessity which would not have arisen but for his own breach of duty.

In my opinion the justification of the defendant depends on two propositions which I shall consider presently. The first is that the duty of the officer in securing the public peace must depend on what is immediately before his bodily senses and mind, and cannot rest on his arriving at a correct judgment upon the actual rights of the respective opposing parties. His protection ought not to disappear merely because his theological equipment is incomplete, and he is unable off-hand without books or argu-

ment to dispose of abstruse questions of title on which canonists and Judges may be found in conflict. The second proposition is that non-intervention is not an act done and an actionable wrong. Had the officer actually introduced Father Conroy's party into the chapel, and identified himself with the illegal acts of an unlawful assembly, he would have found it difficult to justify his assault and trespass by a necessity occasioned by his own misconduct.

Before I discuss these questions, on which the ultimate decision of the defendant's liability must turn, I will say a few words upon some points discussed in argument as to which my opinion is not quite the same as that taken at the trial. They are not perhaps essential to the determination of the case, but as they were discussed at length in the learned Judge's charge to the jury, I cannot properly pass them by without notice.

The learned Chief Baron felt himself constrained by *O'Keeffe* v. *Cullen* (1) to hold that the plaintiff was still parish priest. This Court is equally bound by that decision if it be not distinguishable. Pronounced as it was by very eminent Judges, it is my duty to obey it, though it may not commend itself to my own judgment. What was the learned Judge's view of the suspension is not expressly stated, as the charge nowhere refers to it. Before us the question was not argued, but, as I understood, the suspension was impugned not so much on the ground that it was pronounced *ex parte*, without notice or hearing, as because it (the suspension) was treated as an immediate exercise of Papal jurisdiction through the Bishops, in which case it was supposed that the principle of *O'Keeffe* v. *Cullen* (1) would invalidate it. If this view be well founded, it would seem to go far towards subverting the foundations of all ecclesiastical discipline. No question was put or suggested to the jury, and no direction was given on the subject of the suspension; and I would collect from the learned Judge's charge that he assumed in the plaintiff's favour that he was parish priest in the enjoyment of full powers as such.

If he was such parish priest, was he in lawful possession of the chapel? The learned Judge thought that he was a mere licensee and was not in possession, and he told the jury that the conse-

(1) I. R. 7 C. L. 319.

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quence of holding the priest to be in possession would be that he could exclude arbitrarily all or any of the parishioners. I feel great difficulty in following this view. Where a trust deed is forthcoming, the terms of such deed are conclusive, and the only question is one of construction. Where no document is proved the proper inference is that the property is dedicated to pious uses by the owner, who divests himself of all beneficial title to the soil. It would be most inconvenient to hold that the possession continued, after such dedication, to be in some unknown heir of some unknown founder, or nobody at all; and that the spiritual representation of the parish could not protect the sacred edifice from unlawful aggression. It would be equally inconvenient to hold that divine service was celebrated under a continually renewed licence, revocable at the will of the founder and his successors. Nor do I see that the possession of the priest carries with it as a legal consequence a right of arbitrary exclusion. A parson at common law was in possession, and possession in that case gave no such power to exclude. The keys and custody of the fabric are usually vested in the pastor, and in the absence of evidence the other way, the clergyman ought to be deemed to be in possession of his chapel, not for his own benefit but for spiritual purposes, subject to the recognised and well-known rights of the parishioners. It would certainly be difficult to say that he was not in possession of the sacristy: *Jackson* v. *Courtenay* (1). Some one must be in possession. If the priest is not, who is?

If the plaintiff was in lawful possession as parish priest, it would seem that the acts of Father Conroy's party done for the purpose of enabling Father Conroy to celebrate Mass against plaintiff's will would be a forcible entry, and that such party under the circumstances constituted an unlawful assembly. Whether the assembly inside was an unlawful assembly is a different matter. It may be that a clergyman in danger of molestation and attack in the exercise of his sacred functions in his own chapel may without breach of the law gather some members of his flock around him in the sacred edifice to protect him from illegal violence. I know of no authority pronouncing such assemblage within walls

(1) 8 E. & B. 8.

to be unlawful. It would be hard where lawless outrage was anticipated if the clergyman had to choose between abandonment of his spiritual duty or submission to the fate of St. Thomas of Canterbury.

Whether the plaintiff was entitled to possession or not, if he was actually in possession, it would be a criminal act to dispossess him by force.

I pass from these topics, which relate principally to the issue of possession and do not conclude the case, and turn to the questions on which the liability of the defendant depends.

He was in a position of extreme difficulty, and his natural desire would be to abstain from drastic measures until the necessity for taking them became imperative. The apparent pastor was Father Conroy, whose peaceable enjoyment of the office for a long period raised an inference of legal title, whereas the sudden and surreptitious invasion of the chapel by the plaintiff resembled an act of unlawful intrusion. The officer, who could not be required to form or express any judgment on the question of legal title, had to guard against any appearance of partizanship. Had he ordered Father Conroy to retire, he would have laid himself open to the imputation that he was protecting Father Coyne in what might be an act of audacious usurpation. Father Conroy was accompanied by a large force, and as he was ostensible parish priest about to exercise his apparent spiritual functions, the defendant had to make on the spur of the moment a choice of evils—to run the risk of provoking an explosion by repelling the Galway clergyman—or to allow him to enter, in which case the occupants of the chapel, very inferior in numbers as they seemed to be, might yield without resistance.

He had to act at once. Personally, I think that he erred in not preventing the forcible entry; but his mistake does not necessarily make him a participator in that (*ex hypothesi*) wrongful act.

Plaintiff's counsel contend, not without force, that the conduct of the police was exactly what it would have been if they had been protecting a sheriff in the execution of an *habere*, and they say that it is an intolerable absurdity that the police officer should promise and afford protection to a party engaged in committing

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an unlawful and criminal act, and then turn out the person in lawful possession, on the ground that it was necessary to save him from illegal violence. I feel the strength of this argument. It is hard to avoid an impression that the defendant was there in the interest of Father Conroy, and that, had he believed that Father Coyne was lawful priest, he would have ordered Father Conroy to desist from carrying out what was an act of trespass by force. The question before us, however, is whether the verdict was unreasonable and wrong.

Whatever the officer's duty was, he was certainly not bound to adjudicate on the title of the disputants. He had to act on present facts occurring before his eyes, and if he observed an attitude of neutrality, he is justified for what he did by a necessity imposed by those facts. He did nothing necessarily identifying himself with any unlawful act, as he would have done had he himself forced the door. His non-intervention might be a breach of duty to the public and might involve official rebuke, but it (as such) gave no cause of action. The direct and immediate occasion of his entry into the chapel was the action of Father Conroy. He did not cause the state of things which made the entry and assault necessary. His duty as a peace officer was continuous. He was bound all along to prevent any breach of the peace. His obligation to the public could not be affected by the circumstance that he had omitted to intervene, as he ought to have done, at an earlier stage. Was his civil immunity for acts done in the discharge of that public duty forfeited by that omission? In the absence of active consent or encouragement, an officer ought not to be deprived of protection for acts so done, merely because the necessity for his action *might* not, possibly, or even probably, have arisen if he had sooner adopted preventive measures. The Court, deciding, on a calm retrospect, after the event, assisted by argument, and unaffected by tumult and the risk of bloodshed, ought not to exact from an officer, called upon to decide in an emergency upon a choice of dangers, an impossible standard of duty, as if he was required to be impeccable and infallible. A mere error of judgment does not make him *particeps criminis*. The point is, Did he espouse the cause of Father Conroy? Or was his fault (if any) one of omission only? There was evidence to support

the latter view. The finding on the first issue cannot, therefore, be disturbed unless there was substantial misdirection. As to this I have had some doubt. On the hypothesis that the plaintiff was parish priest with full powers, I think that he was in lawful possession of this chapel, and that Father Conroy was guilty of forcible entry. The inference of consent that would arise from non-intervention on the part of the police present at the commission of a civil tort might be different from what it would be if the transaction was a crime, which it would be their duty to prevent. Though, however, the finding on the second issue may have been wrong, it does not necessarily vitiate the first finding, which if it stands admittedly disposes of the case. Looking at the charge as a whole, I think that the learned Judge directed the jury's attention to the points on which their verdict should proceed. The plaintiff might have been in the right, or Father Conroy, or they might both have been in the wrong. The defendant had to act. If he were neutral when the door was forced, the verdict is right. I think that is what the jury found. A verdict the other way was possible—but there was evidence on which the jury were at liberty to find for the defendant. I do not think that the Court ought to disturb the verdict, on the ground that in some, not very material, points it may not quite follow the view presented in the charge, which as to these matters was not objected to specifically.

If *O'Keeffe* v. *Cullen* (1) was wrongly decided, I doubt that the plaintiff could have any case. Himself a wrongful intruder, and no longer parish priest, he could not in that event have sued Father Conroy for trespass and assault, and he would be in no better position as against the police. Whether that case might not be distinguished on the ground that it was decided on pleading averments, I have not felt it necessary to consider. It may be strange that the Roman Catholic Church alone among voluntary Churches, cannot have its internal litigation disposed of by a judge of its own choosing, if that judge happens to be Pope, and that the Statute of Elizabeth should be deemed to prohibit the exercise of a consensual jurisdiction by His Holiness. Accepting,

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however, the decision, as understood by the Lord Chief Baron, I submit loyally to its authority.

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The plaintiff appealed to the Court of Appeal (1).

May 4–7.

Drummond, Q.C., and *Taylor, Q.C.* (*Ennis* with them), for the appellant.

The Right Hon. The Macdermot, Q.C., *Sullivan, Q.C.*, and *Hume*, for the respondent, were not called on.

May 7.

LORD ASHBOURNE, C.:—

We do not propose to call on counsel for the respondent, having had abundant opportunity of considering and weighing the argument of the appellant, and of referring to the evidence during the hearing, and since the adjournment yesterday.

This is an appeal from the Queen's Bench Division, the Judges of which unanimously declined to order a new trial, or to disturb the verdict of the jury at the trial. It is unquestionably a case of importance, deciding, as it does, the rights and duties of peace officers acting under circumstances of difficulty, complexity, and emergency. The action refers to, and deals with, facts which took place in the neighbourhood of the chapel of Killannin, in the county of Galway, on the 10th February, 1895. The plaintiff is the Rev. Patrick Coyne, who was appointed Parish Priest by Archbishop MacHale so far back as 1875, on which occasion he got possession of the chapel, and got the key of it. He remained there as such until the 7th of January, 1891. Some short while before that date it had been determined by some arrangement between his ecclesiastical superiors—the Bishop of Galway and the Archbishop of Tuam—that the parish of Killannin should be separated from Tuam and joined to Galway. This arrangement did not commend itself to the judgment of the

(1) Before LORD ASHBOURNE, C., and FITZGIBBON and BARRY, L.JJ.

plaintiff, and on the 7th January, 1891, he left Ireland to prosecute an appeal at Rome, where he remained for three years. He returned on the 29th June, 1894; but he failed in the object of his mission, because the Pope affirmed the arrangement between the Bishop and the Archbishop. On returning, the plaintiff officiated as priest in his own house, and not in the chapel, till the 8th February, 1895. Father Conroy officiated in the chapel, at first as administrator, and then as parish priest, from October, 1893, till the 9th February, 1895, a crucial date in the case. On the 9th February, 1895, the day before the eventful Sunday Father Coyne and some of his followers proceeded to the chapel, and, in some way, took possession of it, and held possession. The authorities, having become aware of this, took steps to preserve order and maintain the peace, and they sent to Spiddal, some twenty miles off from Killannin Chapel, to Mr. Tweedy, to take charge of the matter. He was a Constabulary officer, and, on the morning of the 10th he left Spiddal, apparently without any police with him, but found on arrival at Killannin thirty-two police waiting for him to take command. Mr. Tweedy went, in consequence of orders from his superior officers in Dublin. He had never seen either of the reverend gentlemen before, and was bound to neither of them by acquaintance or friendship. Some time after Mr. Tweedy's arrival Father Conroy appeared outside the chapel, with some followers, supporters of his, amounting, it is said, to 140. I shall read Mr. Tweedy's account of what occurred, taking it from his evidence, which was all before the jury, and which they were quite at liberty to credit and adopt. He stated:—"Father Conroy told me he was the parish priest, and that he had come to perform service in his chapel and wanted to get in, and that Father Coyne and a party of Father Coyne's followers were inside; that they were very desperate men, and that some of them were said to be armed with revolvers, and he asked me would I obtain admission for him into the chapel? I said I would not, that I was only there to prevent a breach of the peace. He then asked me would I protect him if he entered the chapel. I told him if he entered the chapel I would not allow anybody to assault him."

As to the number of people inside the chapel, Mr. Tweedy says he had at that time no information; he had seen some eight

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or nine at the windows of the chapel, but that it was not until afterwards, when he went in, that he ascertained that there were a great number. Until he entered the chapel, he had no notion of their number. The evidence proceeds:—"Father Conroy ordered one of his men to break open the sacristy door, and one of his men did so with a sledge. Did you hear rapping at the door previously to that? Yes, he had gone to the door and asked for admittance, and there was no answer. The door was then broken open. Who burst in first? Father Conroy and about five of his followers. Did Father Conroy and those followers precede you into the chapel? They did. I followed them with four of my men, whom I had previously told off for the purpose. When I entered the sacristy, I found Father Coyne standing in the sacristy, at the door leading from the sacristy into the chapel. I could only see those of his followers who were right opposite the door. A man behind Father Coyne had an iron bar in his hand, and I subsequently saw several sticks. Father Conroy went up to Father Coyne and asked him to allow him to pass into the chapel. Father Coyne said he would not allow him in, that he was the parish priest. Father Conroy then began arguing with Father Coyne, each trying to persuade the other that they had the right to go in. Were their respective followers close up at the time? They were. After the police entered, a great number of Father Conroy's followers came in, before we could stop them, into the sacristy. While these gentlemen were arguing, what was the attitude of the followers? The attitude of both followers was very violent and very excited. They were challenging one another apparently, though they mostly spoke Irish. You could understand at any rate that they were challenging one another? Yes, I could understand 'jumpers'; they were calling each other 'jumpers.' Was the attitude of both parties threatening? Yes. Father Coyne and Father Conroy were arguing for some time, and then Father Conroy turned to me, and said would I remove Father Coyne, that he would not allow him into the chapel? I told him that I would not interfere. Father Conroy then turned round, and tried to pass Father Coyne, and get into the chapel, and then Father Coyne put out his hand, and shoved Father Conroy with so much force that Father Conroy came back against

me, and stood on my foot. When Father Conroy's supporters saw that Father Coyne had done this, there was a distinct rush made at Father Coyne by the followers of Father Conroy. When I saw that, I stepped between the crowd and Father Coyne, and one of the policemen did the same. Was that to protect him? Yes, and the other police went to the door to keep back Father Conroy's followers, who were making a rush into the sacristy. I saw the police forced back. There were three police at the sacristy door, and two at the other. Five police had come in, though I told only four to come. Three of the police were preventing the crowd from coming into the chapel, and two were guarding the sacristy from the crowd outside. What was then the demeanour of the followers? Their intention was apparently for those behind to push those in front against Father Coyne, and if that had been done it would have caused a riot. What did you then do? I asked Father Coyne to allow Father Conroy to pass. He refused. I then told him the state of the crowd was getting very serious. Was it getting very serious? It was, and I told him there would be a riot and bloodshed if he did not allow Father Conroy to pass. I asked him several times to allow him to pass, and every time he refused. I then told him I would be obliged to remove him from the sacristy. I asked him would he leave. He said he would not —that it was his chapel. I then put my hand on his arm, and a policeman put his hand on his other arm, and we led him towards the outer door of the sacristy. Father Coyne, when he had got about half way, stopped, and took out some papers, and said he had a lease of the church, and asked me to look at it. I told him I could not look at it. I said that it was as much for his own safety as anything else that I was removing him. I told him the state of the crowd was such that it was as much for his own safety as for that of others that I had to remove him from the sacristy."

He then proceeds in answer to several important questions to give his evidence as follows:—"In your opinion was it necessary for his own safety to remove him from the sacristy? Absolutely necessary. In your opinion, from what you saw of the state of the crowd, was it necessary to remove him in order to preserve the peace? Absolutely necessary. Was it for the purpose of pre-

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serving the peace you removed him? It was, and I told Father Coyne that. I believe he went out quietly? He did. Was any degree of force beyond putting a hand on his shoulder exercised? No force whatever. He was not a bit angry with me, because he stopped talking with me after he went out for two or three minutes. In the result, the peace was not broken? No. No assault committed? No. Were the steps you took on that occasion in your honest belief necessary for the purpose of preserving the peace? They were, in my opinion: it was the only way I could preserve the peace."

Now that is the evidence which gives, in Mr. Tweedy's words, a narrative of what occurred on that day. It is not verbally accepted by the opposite side, but it is taken as a broad general outline of what took place, and really as to the facts there is very little dispute. But the present litigation has arisen from those facts, and this action for assault has been brought against Mr. Tweedy by Father Coyne in respect of the part he took on that Sunday, as detailed in his evidence, as I have read it. The able counsel, whom we have heard, appeared for the plaintiff, and the able counsel, whom we have not deemed it necessary to call upon, appeared for the defendant; and the result was that the jury found Mr. Tweedy's acts were reasonable and necessary to prevent a breach of the peace. The learned counsel for the plaintiff did not deny that at the moment of Mr. Tweedy's action his acts may have been necessary and reasonable to prevent a breach of the peace; but they contended that he should have interfered earlier; that he might—and that means that he should—have intervened to break up the party as an unlawful assembly. But the main thing they insist on is that, whether right or wrong in not breaking up an illegal meeting, it was the fault of Mr. Tweedy not to have interfered to prevent the breaking open of the door. The main and substantial argument of Mr. Drummond and Mr. Taylor was the non-intervention of Mr. Tweedy to prevent the breaking open of the door. Now there is a good deal to be said as to the prudence or imprudence of what was done with reference to that matter. As to whether it was an error of judgment in not preventing Father Conroy and his followers from breaking open the door, I think that an intervention to prevent the breaking open

the door might have been prudent and wise. It may have been an error of judgment not having intervened at that time; I quite feel the full force of all the argument on that point. It must, however, never be forgotten that a person placed in the position of the defendant has one continuous, prevailing, paramount duty all through, and that is to preserve the peace, and to prevent a breach of the peace; and whatever error of judgment he may commit, he can never divest himself of that duty. The fact that he did not prevent the breaking open of the door does not alter that duty, unless to develop it and make it more acute. The effect of forcing open the door was to bring the party inside face to face with the other party. His previous non-intervention might make it open to criticism, but his duties as a peace officer remain. He had not to decide on the complicated question of the ecclesiastical *status* of either of the reverend gentlemen who were unfortunately differing on that day. He had not to determine these points upon which keen intellects may differ:

> "Who shall decide, when doctors disagree,
> And soundest casuists doubt, like you and me?"

All that he had to decide on was, what was occurring before his eyes, what was an assault, and how to prevent an assault, and his responsibility would have been great and serious, if, having broken open the door, riot and bloodshed should have occurred.

But the argument of Mr. Drummond and Mr. Taylor did not stop there. They presented the case stronger against Tweedy. They said more than the omission, more than the error of judgment against him, that he took sides with Father Conroy, and therefore all must be regarded as one transaction with which he and Father Conroy must be identified. The answer to that is, these were all topics for the jury, on which the jury arrived at a conclusion that Tweedy was acting honestly to preserve the peace.

But the argument of Mr. Drummond and Mr. Taylor was not exhausted there. They said that something put by the Chief Baron in his charge to the jury amounted to a misdirection, and so he misled the jury. I am not sure that they were able to present or point out any tangible sentence of the Chief Baron's that could in itself be taken as amounting to misdirection that misled the

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jury. You must take the charge of the learned Judge as a whole; read it from beginning to end, and reading it so, I am of opinion that the Chief Baron very likely thought both parties were in the wrong, but I cannot see that the Chief Baron failed to present every aspect of the case to the jury, and lay the entire case before them from every point of view, and he said nothing to deprive the finding of the jury of its full significance and legal effect. Superhuman judgment, discretion, or ability cannot be demanded from anyone, even from a police officer. All we have a right to expect is reasonable caution, prudence, and judgment. Mr. Tweedy was in a serious and embarrassing position. He was not bound to decide points of ecclesiastical law, as to whether Father Coyne was right, and all his ecclesiastical superiors were wrong, but he was bound to bring ordinary intelligence and discretion to bear on the situation, and exercising his judgment honestly and fairly between man and man, he was bound to prevent a breach of the peace.

It has been argued that, though Mr. Tweedy may have been justified at the moment in intervening to prevent a breach of the peace, still, in consequence of something that he had done, or abstained from doing, at an earlier point than that at which he did act, he was deprived of protection. I fail to find any warrant for that division of the position and responsibilities of a man who in an emergency has to perform the duties of an officer responsible for the preservation of the peace. Several authorities were referred to, but I cannot find one that at all approaches the suggestion that the responsibility of a peace officer can be thus divided. His paramount duty was to preserve the peace, and the case of *O'Kelly* v. *Harvey* (1), decided by the Court of Appeal in this country, dealt with topics very similar to those discussed in the present case. That case decided that a magistrate or peace officer who honestly and reasonably believes it to be necessary, to prevent a breach of the peace, to remove a person from a given position, may remove that person, and does not in so doing incur liability for an assault even though the person so removed is himself innocent, and even though the action of wrong-doers has created the necessity for the removal.

(1) 10 L. R. Ir. 285; 14 L. R. Ir. 105.

Lord Chancellor Law in giving judgment in the Court of Appeal used words which presented his views with absolute clearness. He says at p. 109 :—"Assuming the plaintiff and others assembled with him to be doing nothing unlawful, but yet that there were reasonable grounds for the defendant believing, as he did, that there would be a breach of the peace if they continued so assembled, and that there was no other way in which the breach of the peace could be avoided but by stopping and dispersing the plaintiff's meeting, was the defendant justified in taking the necessary steps to stop and disperse it? In my opinion he was so justified, under the peculiar circumstances stated in the defence, and which for the present must be taken as admitted to be there truly stated. Under such circumstances the defendant was not to defer action until a breach of the peace had actually been committed. His paramount duty was *to preserve the peace unbroken*, and that, by whatever means were available for the purpose. Furthermore, the duty of a Justice of the Peace being to preserve the peace unbroken, he is of course entitled, and, in fact, bound to intervene the moment he has reasonable apprehension of a breach of the peace being imminent; and, therefore, he must in such cases necessarily act on his own *reasonable* and *bona fide belief* as to what is *likely* to occur. Accordingly in the present case, even assuming that the danger to the public peace arose altogether from the threatened attack of another body on the plaintiff and his friends, still, if the defendant believed and had just grounds for believing that the peace *could only be preserved* by withdrawing the plaintiff and his friends from the attack with which they were threatened, it was, I think, the duty of the defendant to take that course."

Now in this case the jury have found that the acts of the defendant Tweedy were reasonable and necessary to prevent a breach of the peace. I take my stand upon that finding, and I see nothing that occurred at the trial, or anything in the argument addressed to us which would invalidate or weaken it. I am therefore of opinion that the decision of the Queen's Bench Division should be affirmed, and the appeal dismissed with costs.

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FITZ GIBBON, L. J. :—

I concur with the Lord Chancellor, and as he has fully stated the evidence and the facts upon which his judgment rests, I shall add only some general observations, especially as to some matters discussed at the trial and in the Court below, which it is right to say that we do not decide.

The action was brought on two counts, first for assault and battery by the defendant, and secondly the plaintiff alleges that he is parish priest of Killannin, and owner of the Roman Catholic Church of that parish, and complains that the defendant and others acting under his orders wrongfully broke and entered the plaintiff's church and expelled him therefrom, and still holds possession of the church against his will. There is therefore one count for a personal wrong, and another for a trespass to a building of which the plaintiff says he is owner. The defences deny the acts, deny that the plaintiff is parish priest of Killannin, and deny that he is the owner of the church. There is then the special defence, to the several causes of action, that the plaintiff took possession of the church with a mob, that he was trying to prevent Father Conroy, then *claiming to be the parish priest*, from entering the church for the purpose of saying Mass, whereupon a large number of the parishioners who were with Father Conroy became angry, and threatened to attack the plaintiff with personal violence. Wherefore the defendant, as a police officer, and in order to prevent a breach of the peace which was then imminent, and to protect the plaintiff from threatened violence, *entered the church*, and requested plaintiff to withdraw, which he refused to do; whereupon, to prevent a breach of the peace, and to protect the plaintiff from violence, the defendant did the acts, doing no more than was necessary, &c. This special defence raises no issue as to the plaintiff's position as parish priest, nor as to the ownership of the church.

The Chief Baron left only two questions to the jury. First, was what was done to the plaintiff by the defendant, and by the constables acting under his directions, on the 10th February, 1895, reasonable and necessary to prevent a breach of the peace? The jury have found that it was, and therefore, as regards all that was proved to have been done to the plaintiff himself, or to his church, by the defendant, there is a finding that it was reasonable and

necessary to prevent a breach of the peace. That finding is, in my view, the sole foundation of our judgment in favour of the defendant, but it does not find one way or the other that the defendant broke and entered the church, nor whether the plaintiff was the parish priest or owner of the church.

The second question put to the jury was, was the plaintiff possessed of the church of Killannin at the time of the acts complained of? The jury answered that question in the negative.

At the close of the charge, Mr. Drummond called upon the Chief Baron to tell the jury: 1st. That the breaking of the door was an unlawful act, no matter whether the persons doing it were entitled to the rights of parishioners or not; 2nd. That the defendant removed the plaintiff at the request of Father Conroy.

I asked, at an early stage, whether, on the evidence, the breaking of the door was the defendant's act, and I understood it to be conceded that it was not proved to be so. In other words, there is no conclusive evidence, no question put to the jury, and no finding, that Tweedy was a co-actor with Father Conroy or a joint *tort-feasor* with him. To my mind, the evidence is clear the other way. The Chief Baron states that, to understand Mr. Drummond's first requisition, it is necessary to give a short summary of his summing up, and he then reports how he explained to the jury the difference between presence in a building as a licensee for a particular purpose, and being in possession of it. It is not necessary, for any purpose of my judgment, to enter upon this discussion, and I wish to make it perfectly plain that, in my view, the defence stands clear of any of the difficulty surrounding the title to property situated like this church. It is often easy to say who has the right to use such property, but extremely difficult to prove any legal title, or to define the right of user. But I do not think it necessary to consider these questions at all.

Does the plaintiff say, or does he not, that the act of breaking into the chapel was the act of the defendant? I do not think that there was any evidence to sustain such a finding. But I must state my view as to the breaking of the door by those who did it, and show how it affected the defendant. A number of people came up, with a clergyman at their head who claimed to be the parish priest, prepared to break by violence into the building. Mr. Tweedy refused to render any active assistance

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to Father Conroy, or to those outside the building; he refused to break the door for him, or to do anything to gain him an entrance; but when he was asked, in substance, whether, if Father Conroy took the law into his own hands, he would protect him, and prevent him from being assaulted (both expressions occur in the evidence) he answered that he would not allow anyone to assault him. It is perfectly clear, on the evidence, that what Mr. Tweedy meant was this, "I will take no part in any trespass, or in forcibly entering the building, but, whatever you do to the building, I will protect your person from assault." I assume that the breaking of the door was an actionable trespass, and even a breach of the peace, but if so, the plaintiff has his remedy against those who did it, but by looking on, the present defendant did not make it his act. With all respect, I think he took too limited a view of his duty; but he was certainly right in thinking that it was not only his right, but his duty, to protect the person of Father Conroy, and of everyone else too, from assault. It was a reasonable view of his duty for a Constabulary officer to take, and it is one often taken by the police, that the time to intervene is the moment when it becomes necessary to protect the person from violence, as distinguished from stopping a dealing by force with disputed property. I cannot impute to the defendant that he meant to protect Father Conroy only from assault, or to allow him to assault others. The defendant's part in the breaking into the church, in my view of the evidence, was entirely negative. It was not his act, and he and the police went into the church, with Father Conroy and his followers, for the purpose of preventing a personal breach of the peace by any of the parties to the transaction. If that be so, it appears to me to place this case on a very simple ground. Having accompanied Father Conroy and his followers into the church, the defendant's duty *there* was to protect every person from assault, and what he did inside was done reasonably in carrying out the duty he was there to perform, namely—to prevent personal violence. If that be so, we cannot discuss the Orange Lily case (1) here, and it is too late, at least in Ireland, to question the power of a constable, as a reasonable exercise of his duty to preserve the peace, to put a person into a safe place, who is not himself a wong-doer, but who, if not removed, will

(1) *Humphries* v. *Connor*, 17 I. C. L. R. 1.

become the subject of a breach of the peace. That seems to have been the view of the plaintiff's position taken by those who framed the defence in the present case, for the assault on the plaintiff is justified as being necessary for his protection. Apart from the pleading, the evidence appears to me to be sufficient, not only to sustain this defence, but also, if necessary, to sustain a finding that, as between two wrong-doers, the intervention of Mr. Tweedy was thoroughly justifiable. The evidence is uncontradicted that, in the very last place where such a thing ought to have taken place, there was an actual personal collision between two clergymen, each by physical force asserting his right to exercise his clerical functions. The danger to the public peace was enhanced by the presence of an angry, excited, violent, and not unarmed faction, supporting each of the clerical combatants. Under such circumstances, it was the clear and plain duty of the defendant to prevent a breach of the peace—to protect everyone from assault—to remove anyone whose presence or conduct endangered the peace. In discharging this duty, the defendant was protected, so long as he acted reasonably, and it was not unreasonable that he should think that the safest way out of the trouble was to prevent Father Coyne from continuing any longer his physical resistance to Father Conroy. The jury has so found, and I approve of their verdict. If the defendant had been imprudent, or even wrong, in allowing the invaders, under Father Conroy, to go so far, this could not alter or diminish his duty, or his protection, when the matter came to a crisis in the sacristy. This being my view of the case, and the ground upon which the defendant succeeded at the trial, no question of title to the building, or of the *status* of either priest, is involved. The defendant's position would have been the same if the parties had been quarrelling about a right of way, or any other matter. I mention this, because I find references in the Queen's Bench to the *status* of a parish priest of a voluntary Church, and more especially references to the case of *O'Keeffe* v. *Cullen*, which I am not prepared to accept without discussion, but which have no application, in my judgment, to the present case. I never understood *O'Keeffe* v. *Cullen* (1) to decide anything which bears on the present case.

(1) I. R. 7 C. L. 319.

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BARRY, L. J. (1):—

I concur, and I have nothing to add to what has been said by the Lord Chancellor and FitzGibbon, L.J. If I were to go in detail over the facts of the case, it would be to repeat again what they have said. I wish to express my concurrence with the finding of the jury, that the act of the defendant was a reasonable exercise of his discretion as a peace officer, in the discharge of his duty to prevent a breach of the peace. There are many nice questions which have been referred to, which I do not desire to discuss, as to the exact right in the ecclesiastical claims of these two gentlemen, each of whom claimed the right to, and possession of, the church on that occasion. Taken in a general way the position of the peace officer was this—Here is a quarrel between two clergymen, one of whom claims to be parish priest, and to have the right to discharge his duty in that church. The other is disputing that. One of them is prepared to take possession by force, and the other to resist that attempt. In that state of things the jury have found that there was imminent danger of a breach of the peace, and there was ample evidence to sustain that finding. In point of fact, before Mr. Tweedy interfered at all, there was an actual breach of the peace, because one of the clergymen shoved the other in such a manner as to throw him back on the foot of the police officer, who was endeavouring to maintain the peace. Under the circumstances, I cannot see how it can be disputed that it was the bounden duty of Mr. Tweedy to intervene, in order to prevent a personal collision between the parties.

As to the other matter put forward in the argument, that Mr. Tweedy forfeited all claim to protection from his official position, because he did not intervene earlier, but allowed the infuriated followers of this clergyman to assert their claims with violence, I deny that. His duty, as a police officer, still remained, to preserve the peace.

Solicitor for plaintiff: *J. H. Menton.*

Solicitors for defendant: *M'Mahon & Tweedy.*

R. D. M.

(1) This report was not revised by the late Lord Justice.

BLIGH *v.* THE RATHANGAN RIVER DRAINAGE DISTRICT BOARD (1).

CONNELL *v.* SAME.

CARROLL *v.* SAME.

BROWN *v.* SAME.

MOONEY *v.* SAME.

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Oct. 28, 29. Nov. 1, 2, 5.

Negligence—Local Drainage Board—Injury caused by negligence in the execution of statutory powers—Flowing water—Drainage (Ireland) Act, 1863 (26 & 27 *Vict. c.* 88).

In or prior to the year 1883, acting in the execution of their statutory powers of construction and maintenance, the defendants, a Drainage Board constituted under the 26 & 27 Vict. c. 88, for the purpose of draining and improving the district, made deeper and wider the bed of the Rathangan river, and diverted into it another stream, thereby materially increasing the volume of water flowing down the Rathangan river, and altering its natural flow. They failed to exercise due care in periodically cleansing the river bed, the necessity for which was mainly or wholly caused by the increased flow of water and the alterations made by the defendants. As the direct result of such negligence on the defendants' part, the river became so choked with accumulations of silt and mud that, in July, 1896, after some heavy rains, the waters of the Rathangan river and its tributary streams, being hemmed back by the obstructions so permitted to accumulate and unable to escape, flooded the lands of the several plaintiffs, tenants from year to year of small holdings near the river.

On case stated on the hearing at Assizes of appeals in civil bills claiming damages for the injury so caused:—

Held, that the defendants were liable; that the matters complained of gave to the plaintiffs a right of action at common law, and that the statute (under which the defendants claimed immunity) afforded a justification only for acts done under the statute with due care, not for acts done negligently.

Geddis v. *Proprietors of the Bann River Reservoir* (3 App. Cas. 340) followed.

(1) Before Sir Peter O'Brien, L.C.J., Palles, C.B., and O'Brien and Johnson, JJ.

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CASE STATED for the opinion of the Queen's Bench Division, pursuant to 27 & 28 Vict. c. 99, by the Right Hon. Mr. Justice Johnson, on the hearing before him, at the Spring Assizes, 1897, for the county Kildare, of five civil bill appeals from orders of dismissal made by His Honour the County Court Judge. The Case stated was to the following effect:—

The Rathangan river drainage district (of which defendants were the Board) was constituted under the 26 & 27 Vict. c. 88. The construction of the works, pursuant to the original and revised plans, sections, and estimates deposited with the Board of Works, was commenced in 1875, and completed in 1883. The only question, however, involved in the appeals was as to the liability of the defendants for the maintenance of the works as constructed, including cleansing the beds and channels of the rivers and streams in the drainage area, and keeping them free from accumulations and obstructions. The principal part of the drainage district is low-lying bog, through which flows the main river known as the Rathangan river, receiving in its course the waters of several smaller tributary streams. The drainage works consisted of three classes: (*a*) straightening, deepening, and widening the main (Rathangan) river; (*b*) diverting the Prosperous river from the canal (into which it formerly emptied) to the Rathangan river, by deepening the Prosperous river, and altering its course by two new artificial cuts; (*c*) cleansing out the beds and channels of the main river and its tributaries. In all about 32 miles of bed and channel of main and tributary rivers and streams in the drainage area were under defendants' care and maintenance. The diversion of the Prosperous river from its original course had materially increased the flow of water through the main (Rathangan) river, especially during wet weather.

All five holdings of the several plaintiffs were reclaimed bog, their lowest parts being from about one foot to two feet above the ordinary level of the water of the several rivers and streams in the drainage area.

Bligh and Connell (the plaintiffs in the first and second cases) were undertenants from year to year by parol; their holdings consisting of about two acres (Irish)—valuation, £1; yearly rent, £1; the higher parts adjoining red bog, the lower parts (to which the

injury by flooding occurred) being between 60 and 70 yards distant from the main river, from which they were separated by a strip of higher land in the occupation of Cremin, their landlord.

Carroll and Brown (the plaintiffs in the third and fourth cases) were undertenants from year to year by parol, on the Robertstown river (a tributary stream); each holding consisted of about 3 acres, Irish; valuation, £2; yearly rent, £2. The opposite bank of the river was at least one foot higher than these holdings, which were almost all flat ground.

Mooney (the plaintiff in the fifth case) was a judicial tenant; his yearly fair rent is £5; and his holding, consisting of 19A. 0R. 35P., bounded on one side by the main river, and intersected by the Prosperous river, which here formed a junction with the main river. Part of this holding was low-lying, part higher land.

The uniform practice of the defendants in maintaining the drainage works was to divide the entire of their drainage system into three sections, and to cleanse each section, by contract, once in every three years. But from local causes some parts required greater attention, and more frequent cleaning and care than others. Between "Quigley's Bridge" and the canal aqueduct the river bed was nearly level, and the stream sluggish; above "Quigley's Bridge" there was a considerable fall, and the current being checked when it met the sluggish stream below, precipitated the silt and mud it carried, which, heaped up and matted together with rushes and weeds, impeded the flow of the water. With ordinary care this part of the river ought to have been cleansed at least once a year, and this might be effected at an annual cost of about £10. Similar deposits accumulated at each side of the river, below the junction of the main and Prosperous rivers, and this part of the river ought with ordinary care to be cleaned at least once in every two years. These places had not been cleaned for at least three years before the flooding of 24th July, 1896, and accumulations of hard deposit had formed, and on the 24th July, 1896, existed on each side of the river below Mooney's holding, contracting the channel, and diminishing the passage for the water of the river; and hard accumulations of mud, silt, and matted rushes and weeds had formed, and on the 24th July, 1896, existed in several places on the bottom of the river, between the canal aqueduct and

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Quigley's Bridge, obstructing the flow of the stream; and, by thus backing up the water above the canal aqueduct, raised the level of the stream about 18 inches higher than it would have risen if the accumulations had not existed.

It was part of the duty of the secretary of the defendant Board to prepare and submit to the Board at their annual meeting an estimate of the drainage rate necessary for the maintenance of the works for the next year. Sometimes (the specific occasions were not given in evidence) the Board rejected the estimate, and struck a rate less than was absolutely necessary, with the result that for four years before July, 1896, the secretary had ceased to submit any estimate to the Board because the Board would not strike the necessary rate. The contractors for cleansing the rivers and streams were superintended and paid by the secretary of the Board. His evidence in his own words was:—"I do the best I can with the money I get to keep the river in order, and all the monies I got were so expended on it. Of the rates struck, on an average, 8½ per cent. was not paid, and was lost to the Board."

On the 24th July, 1896, a very heavy rainfall swelled the waters of the main river and its tributaries; and the low lying parts of Bligh's, Connell's, and Mooney's holdings, and the holdings of Carroll and Brown were flooded. The cabins of Bligh and Connell were injured; the crops of all the plaintiffs, on their patches of tillage, and their young grass and hay were greatly damaged. The rainfall continued on the 25th and 26th, and the water lay on the lands.

It was contended for the defendants as a fact that this flood was merely surface water from the rain which fell on the lands, and could not get away from the lands of Bligh and Connell by reason of the foul state of their open drains and the obstruction offered by the timbers of a broken bridge for which the defendants were in no way responsible; that the surface water was thus prevented from running away, and that the lands of the other plaintiffs were flooded in like manner by surface water, which by the foul condition of these drains on the lands could not get away. His Lordship found on the evidence before him that this was not so; and stated that the following facts were established on the evidence adduced on the hearing of the appeals:—

"(*a*). The drains on the lands of the several plaintiffs were not thoroughly clean, but were not foul, and were capable of discharging the surface water of the holdings, if not prevented by the river water, which during the flood was at a higher level than the level of the flooded lands, owing to the back-water caused by the obstructions in the main river and tributaries.

"(*b*). The accumulation of mud deposit on each side of the river below Mooney's holding narrowed the passage for the water of the river and obstructed its flow to such an extent that the back-water thus caused in the river ran up on Mooney's land and flooded it, and also prevented the surface water from discharging from the land drains, as it otherwise would have done.

"(*c*). The hard accumulated deposits on the bottom of the main river above the canal aqueduct and the matted rushes and weeds in the river obstructed the flow of the stream, so that the back-water thus caused was forced up the drains of Bligh's and Connell's holdings and flooded them with river water, and also prevented the surface water from getting away by the drains on these holdings, as it otherwise would have done, and also obstructed the flow of the Robertstown tributary, which being forced back, flooded the holdings of Carroll and Brown.

"(*d*). The culvert under the canal aqueduct was sufficiently large to vent at all times during the flood all the water which came to it; the level of the water was the same at each side of the culvert above and below; the culvert was not full at any time during the flood, and did not cause the back-water which flooded the plaintiffs' lands.

"(*e*). The back-water which flooded the lands of the plaintiffs (except Mooney) was caused by accumulations in the river above the canal aqueduct, and the water which flooded Mooney's lands was caused by accumulations below the junction of the main and Prosperous rivers.

"(*f*). The defendant Board had for four years before 1896 refused to strike and levy rates sufficient in amount to provide moneys, and did not provide or expend moneys sufficient in amount, effectually to maintain and uphold, and neglected to maintain and uphold the main river above the canal aqueduct, and also below Mooney's holding, free and clear from the

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obstructions and accumulations before mentioned, or in an efficient condition to admit of the river water flowing away without obstruction.

"(g). The plaintiffs respectively sustained serious loss and damage by the flooding of their holdings on the 24th July, 1896; the flooding being the direct and immediate consequence of the water of the main river and tributaries being backed up by the aforesaid obstruction to the flow."

For the plaintiffs it was contended at the hearing of the appeals —That the sole object for which the drainage district was constituted and placed in the care and control of the defendants was to maintain the drainage system efficiently, and not to flood the plaintiffs' lands by negligence either of omission or commission: that the 26 & 27 Vict. c. 88, s. 57, created and imposed on the defendants a statutory duty towards the plaintiffs (amongst other persons within the drainage area) effectually to maintain the drainage system in an efficient condition to let the waters of the rivers and tributaries flow away from plaintiffs' lands without obstruction; that by the 35 & 36 Vict. c. 31, s. 2, the respective plaintiffs were liable to be, although they had not as yet in fact been, taxed indirectly towards drainage charge by having their rents increased. No intention could be imputed to the Legislature to leave other persons, within the area, of the well-known class and condition of the plaintiffs, absolutely without redress, or to deprive them of any redress for injury by the defendants' negligent omission to discharge their duty; that the defendants not only negligently omitted to maintain the works and cleanse the rivers and tributaries with reasonable efficiency, but, refusing to make and levy and expend on cleansing and maintenance proper and sufficient rates and moneys, were guilty of negligent misfeasance, resulting in actionable damage to the plaintiffs for which they were entitled to recover.

For the defendants it was contended that even if cleansing was a statutory duty of maintenance (which was not admitted), and was imposed on and not performed by the defendants, yet no provision was made by any statute expressly or impliedly giving any of the plaintiffs a right of action, and that

none of the plaintiffs had at common law a right of action for damages against the defendants; though possibly the defendants might by other proceedings be compelled to discharge such duty; that the alleged negligence imputed to the defendants was that of omission or nonfeasance only, and not of commission or misfeasance, and that the plaintiffs' actions were not sustainable against the defendants for damage sustained by defendants' nonfeasance, if any.

The only questions argued on the hearing of the appeals were, as stated in the case, the following:—

"1. Whether the defendants were under any and what statutory or other liability to the plaintiffs respectively to maintain and keep with reasonable care the beds and channels of the main river and its tributaries respectively cleansed from the aforesaid accumulations and obstructions, so that the water might flow away unobstructed?

"2. Whether under the circumstances before stated the plaintiffs, respectively, have any cause of action against the defendants?

"3. Whether the processes in margin respectively are, or by any amendment would be maintainable against the defendants, under the circumstances aforesaid?

"His Lordship added that other similar processes (not yet heard before the County Court) depended upon the result of the present appeals, and that he had directed the present case to be stated at the instance of the defendants, upon the question whether the plaintiffs were entitled to decrees. The damages had been contingently assessed in each case.

Wakely, and *Samuels*, *Q.C.*, for the defendants.

Falconer, and *Cherry*, *Q.C.*, for the plaintiffs.

The arguments of counsel were the same as before the Judge of Assize, already summarised in the case. The following Acts and authorities were referred to:—26 & 27 Vict. c. 88, The Drainage and Improvement of land (Ireland) Act, 1863, and the amending Acts 29 & 30 Vict. c. 49, and 35 & 36 Vict. c. 31: *Geddis* v. *Proprietors*

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of the Bann River Reservoir (1); *Atkinson* v. *Newcastle and Gateshead Waterworks Company* (2); *Couch* v. *Steel* (3); *Glossop* v. *Heston and Isleworth Local Board* (4); *Cowley* v. *Newmarket Local Board* (5); *Picton, Municipality of,* v. *Geldert* (6); *Borough of Bathurst* v. *Macpherson* (7); *Sanitary Commissioners of Gibraltar* v. *Orfila* (8); *Cracknell* v. *Mayor of Thetford* (9); *Mason* v. *Shrewsbury and Hereford Railway Company* (10); *Parrett Navigation Company* v. *Robins* (11); *Nicholl* v. *Mulkear Drainage Board* (12); *Shea* v. *River Bride and Kilcrea Drainage Board* (13); *Peebles* v. *Oswaldwistle Urban District Council* (14); *Glasson* v. *Kilmasthulla Drainage Board* (15).

Cur. adv. vult.

Nov. 5.

SIR P. O'BRIEN, L. C. J.:—

This case, which has been reserved for our determination by my brother Johnson, involves a question of very considerable importance. That question is, what is the liability, if any, to riparian proprietors and occupiers along the Rathangan river for damage caused to them by the Rathangan Drainage Board omitting to scour and cleanse the main artery of their drainage district? That is the question of law which has here been presented for our consideration. The main facts of the case are comprised within a narrow compass. It appears that the Rathangan drainage district (of which the defendants are the Board) was constituted under the 26 & 27 Vict. c. 88. The case stated that the drainage work consisted of three classes: (*a*) straightening, deepening, and widening the main Rathangan river; (*b*) diverting the Prosperous river from the canal, into which it formerly emptied, to the Rathangan river, by deepening the Prosperous river, and altering its course by two main artificial cuts; (*c*) cleansing the beds and channels of the main river and its

(1) 3 App. Cas. 430; I. R. 11 C. L. [160.
(2) 2 Ex. D. 441.
(3) 3 Ell. & Bl. 402.
(4) 12 Ch. D. 102.
(5) [1892] A. C. 345.
(6) [1893] A. C. 524.
(7) 4 App. Cas. 256.
(8) 15 App. Cas. 411.
(9) L. R. 4 C. P. 629.
(10) L. R. 6 Q. B. 578.
(11) 10 M. & W. 593.
(12) 6 L. R. Ir. 45.
(13) *Ibid.* 179.
(14) [1897] 1 Q. B. 625.
(15) Unreported.

tributaries. It is found in the case that the diversion of the Prosperous river from its original course has materially increased the flow of the water through the main Rathangan river, especially during wet weather. It appears to me to be plain, from the statements in the case, that silt and mud, owing to the increased flow and velocity of the water, were brought down in large quantities, and were precipitated on the bed of the river, and there formed large accumulations, which impeded the flow of the water; in fact, hemmed it back and caused it to flow over the plaintiffs' lands, and to do the injury complained of. It is found in the case that the bed of the river had not been scoured for some years, and that if it had been scoured and cleansed the damage which was done would not have accrued. This raises the net question, was the defendant Board responsible to the plaintiffs for not scouring and cleansing the main artery—the Rathangan river. The plaintiffs were not proprietors or lessees, but occupied lands, under parol tenancies, adjacent to the banks of the river. The main contention on the part of the defendant Board is based on the distinction found in the cases between the consequences which attach to acts of commission and mere nonfeasance. It is alleged in their behalf that the damage complained of arose from their omitting to scour and cleanse the bed of the river, and that whilst they would be responsible for misfeasance or acts of commission, no responsibility attaches to them for mere nonfeasance. No doubt the distinction between acts of commission and mere nonfeasance formed the basis of the decision in many cases cited at the bar, and the question is whether the case before us falls within that category of the cases where mere nonfeasance was held to establish a ground of immunity. We think it does not fall within this category, and on this ground, namely, that in the particular case before us the common law rights of the riparian proprietors and occupiers along the banks of the Rathangan river were interfered with and infringed by the acts of the defendant Board. No doubt, the Board had a statutable justification for the original works—that is to say, they executed the original authorised works without negligence; but nevertheless these works, though authorised, interfered with the common law rights of the plaintiffs; because the Prosperous river, having

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been diverted, and the Rathangan river straightened and widened, there was an increased volume of water at an increased velocity sent down through an altered channel. In fact, there was an artificial flow through an altered channel.

If there were no statutable justification for this interference with the flow of the water and the channel, an action at common law could be maintained. An actionable wrong would have been done to the riparian proprietors and occupiers—of this there can be no doubt. The law on the subject is quite familiar, and is clearly established by the case of *Embrey* v. *Owen* (1) and recognised in a host of other cases. Independently then of the Act of Parliament, a *prima facie* actionable wrong would have existed, and it appears to me that the question in the case is whether the defendant Board can justify under the Act of Parliament. They would, in my opinion, have a justification if their powers were limited to works of original construction merely; but in my judgment they have no such justification, as it is plain from the section quoted they were to maintain as well as to construct, and had for this purpose an express statutable power to enter and scour and cleanse the stream, and to raise the necessary funds which, indeed, by the statute they are not only empowered, but required, to raise. If by a reasonable exercise of their powers under the statute they could have prevented the damage complained of, and, by reason of their neglect in putting these powers into operation, the damage arose, they are responsible. In that case they cannot justify under the statute. This is, I think, the principle of the decision in the well-known case of *Geddis* v. *The Proprietors of the Bann River Reservoir* (2). No doubt, in that case the proprietors of the reservoir let down from time to time certain quantities of water into the Muddock, which, owing to the uncleansed state and inadequacy of its bed, overflowed its banks and caused damage. There on the occasion in question the Drainage Board did no act independent of the original construction of the works, but the judgment of the Lords turned on the question whether or not the proprietors of the Bann Reservoir had power to enter and scour and cleanse and widen the bed of the Muddock.

(1) 6 Ex. 369. (2) 3 App. Cas. 430.

The Law Lords clearly assumed that there would be a cause of action if the defendants in that case had the powers I have referred to. The judgments clearly proceeded on that basis. What they considered was, what was the true construction of the particular local and personal Act. Lord Hatherley, at page 447 of the report, after examining in the most elaborate manner the various sections of the particular Act says: "And having power so to make use of it," that is of the Muddock, "they would have the power to scour and cleanse it from time to time, and if they have the power of so cleansing it, it appears to me very hard that a person who is injured by their introducing the water in the manner in which it has been introduced, that is to say, *not by a natural flow and at such times and in such quantities as it had been accustomed to come down the Muddock*, but in the quantities and at the times required in order to carry out the duties imposed on them by the Act of Parliament, were bound to keep clear the channel they had so provided and used, in order that they might not by reason of the additional amount and quantity of water they so sent down, and by reason of the mode and times in which they sent it down, occasion the damage which has been occasioned to the plaintiff. [His Lordship here continued to read Lord Hatherley's judgment down to the words, "to prevent the mischief," on page 449 of the report. He pointed out how Lord Hatherley had distinguished the *Thetford Case* (1), that the defendants in that case had merely done what they had statutable authority to do, and again referred expressly to the language of Lord Hatherley:— "But nothing of its own accord had been done by the Company which could be said to be the cause of the injury the plaintiff sustained." His Lordship then continued:—]

The words of Lord Blackburn are much in point. He says, at page 455 of the Report:—

"I take it, without citing cases, that it is now thoroughly well established that no action will lie for doing that which the Legislature has authorized, if it be done without negligence, although it does occasion damage to anyone; but an action does lie for doing that which the Legislature has authorized, if it be done negligently. And I think that, if by a reasonable exercise of the

(1) L. R. 4 C. P. 629.

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powers, either given by statute to the promoters, or which they have at Common Law, the damage could be prevented, it is, within this rule, 'negligence' not to make such reasonable exercise of their powers. I do not think that it will be found that any of the cases (I do not cite them) are in conflict with that view of the law. Now, upon that view of the law, if in this case the learned Judges of the Exchequer Chamber are right in holding that the defendants have no power to interfere with the channel of the Muddock at all, of course no action will lie against them. But if, on the other hand, Baron Fitzgerald and Chief Baron Palles are right in the view which they took, that they have power to do so, I think that the conclusion becomes irresistible that they ought to adopt a reasonable exercise of that power by cleansing, scouring, widening, and deepening the natural channel of the Muddock, so as to make it capable of receiving the waters which they pour down it, and that not to do so before they poured down the water, was a neglect to make a reasonable use of the powers given to them by the statute. The whole question, therefore, comes round to this: Was such a power given or was it not?"

The whole question, then, according to Lord Blackburn was, was such a power given or was it not? The question that Lord Blackburn was dealing with was whether a power was given to scour and cleanse the Muddock. He held, upon the true construction of the local and personal Act he was construing that there was such a power conferred. Here it is not denied that such a power exists, and as it does exist the defendant Board is, in my opinion, responsible for the damage done. But it is alleged on the part of the defendants that the only default of the defendants is the mere omission to scour—that what they have been guilty of is mere nonfeasance, and therefore that they are not responsible. It will be observed that in *Geddis' Case* (1) in the House of Lords there is not a word said about commission or omission, misfeasance or nonfeasance. The only question was, was there power to do the particular thing? No doubt the distinction is recognised in many other cases, but they are of a different class from the case now before us. The Lord Chief Baron asked Mr. Samuels whether he could cite any case where there was an interference with common law rights and where the distinction between misfeasance and nonfeasance formed a basis of decision. He admitted he could cite no such case. Many cases were cited in which what was complained of, being mere nonfeasance, no cause of action was held to arise. But

(1) 3 App. Cas. 430.

all these were cases where no responsibility would have existed independent of the particular statute, and the latter was construed to confer no new right. This was the *ratio decidendi* of *Cowley* v. *The Newmarket Local Board* (1). The question always is whether, when no common law or antecedent right was interfered with, it was the intention of the Legislature to create by the statute a new liability?

The wide general proposition laid down by Lord Campbell in *Couch* v. *Steel* (2) is not now law. The question is, says Lord Herschell, adopting the language of Lord Cairns, what is the purview of the Legislature in the particular statute and the language they employed? And Lord Hannen points out, in the same case, that the question is, "Can a distinct intention on the part of the Legislature be inferred from the particular statute under consideration to create a new liability?" And he held, unless such distinct intention could be inferred, there being no original or independent right infringed, no action would lie for mere misfeasance.

Mr. Samuels further contends that *Robinson's Case* (3) and the language of Lord Esher are in his favour. He says, on the authority of that case, that the only remedy is application to the Court or to the Local Government Board to compel the work to be done. He says where a remedy is prescribed in the statute, that is the only means of redress. This doctrine, however, applies to a wholly different class of cases—it applies to cases where there was no original right, no common law right. It applies merely to cases where a new right is conferred and a remedy for its infraction prescribed by statute. Here, however, in the case before us there was an original common law right infringed. There was power to enter and cleanse; and, in the words of Lord Blackburn, there was a neglect to make a reasonable use of the powers given to them by statute. The defendant Board cannot therefore justify under the statute, and they are, in my opinion, accordingly responsible.

(1) [1892] A. C. 345. (2) 3 Ell. & Bl. 402. (3) [1897] 1 Q. B. 619.

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PALLES, C. B.:—

The plaintiff's lands have been flooded by reason of the non-removal of certain accumulations of silt, rushes, and weeds which had collected in the Rathangan river, and which obstructed the flow of the water therein. Before the execution of the defendants' works this river and the Prosperous river were natural streams.

The defendants, under the powers of their statute, diverted into the Rathangan river the water of the Prosperous stream; and they also straightened, deepened, and widened the Rathangan river.

Thus the amount of water flowing into the Rathangan river was increased, and its natural flow was altered. This altered flow of the river was of considerable velocity immediately above a place called Quigley's Bridge, in consequence of a steep gradient in the level of the bed, and this velocity was diminished below Quigley's Bridge by reason of the bed of the river there being nearly level. This check in the velocity of the flow of this altered volume of water caused the accumulations I have referred to.

The defendants had, under the same statute as authorised the execution of their works, legal power to enter upon the bed of the stream, and to remove the accumulations I have mentioned; further, the same statute, by authorising a rate for the purpose, provided the defendants with funds to pay for such removal, and for otherwise cleansing the river; and lastly, it is found as a fact, that there was an absence of due care in not removing the accumulations previously to the time at which they caused the flooding.

The question is, whether the circumstances I have mentioned give the plaintiff a right of action against the defendants for the damage caused to his lands by the flooding.

But for the statute, it is clear that the action could have been maintained. The plaintiff had a common law right that the water of the stream should continue to flow in its natural volume, and in its accustomed manner. The defendants caused it to flow in a different manner, and thereby caused damage to the plaintiff's lands. Thus the question is, not whether the statute gives the plaintiff a cause of action, but whether this act of flooding, which, without the statute would, have been an actionable wrong, is

justifiable under the statute, or, in other words, was authorised thereby.

The contention of the defendants is not only that the statute authorised the original erection of the works, and their maintenance by the defendants in such a reasonable state of repair as would not result in needless damage to the occupiers of the surrounding lands, but, further, that it justified them in maintaining those works, and the streams over which they had control, in such a state that the entire of the water which came down from the upper portion of the river could not be carried off through the channel lower down, but must necessarily have flooded the plaintiff's land.

I entertained, from the moment I heard the case opened, a clear opinion that that contention was unsustainable, and that the wilderness of decisions which have been cited for the defendants are wholly inapplicable to the case before us.

This can be shown in a few words. For what acts of the defendants does the statute before us afford a justification? Acts in exercise of the powers granted by it. For damage *reasonably* resulting from such acts, an action is not maintainable, and compensation therefor must be sought from the tribunal appointed by the statute. But damage which is caused by the negligent maintenance by the defendants of their authorized works in a state calculated to cause unnecessary damage does not *reasonably* result from the authorised works. For it redress cannot be obtained under the compensation clauses, and for it an action lies, as the justification afforded by the statute does not extend to it. I have never heard this position doubted. The only contention which I have ever heard raised in such cases is whether the act, or omission, of the defendants, relied upon by the plaintiff, is in law a negligent one, or, in other words, one as to which the defendants owed a duty to the plaintiff.

Upon both of these questions, viz., whether a statute, such as the present, justifies a negligent act of the defendants, and what acts amount in law to negligence, the decision in *Geddis* v. *The Proprietors of the Bann River Reservoir* (1) is a distinct authority. That

(1) 3 App. Cas. 430.

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case, although in one respect different from the present, involved identically the same principle, viz. the character of the acts justifiable under such a statute as we have before us here. In that case the defendants were authorised by their Act to divert the water of certain natural streams into, and to store it in, a reservoir, and from that reservoir to supply, through the channel of a natural stream called the Muddock, sufficient water to enable the mills on the Bann to be worked at all seasons of the year. By reason of these works part of the channel of the Muddock, between the reservoir and the mills, became choked, and, for want of cleansing, incapable of discharging the volume of water sent down through it by the defendants, with the consequence that the plaintiff's land was flooded. For the damage thereby caused, the plaintiff brought his action, the first of his causes of action being framed in trespass. The defendants justified under their statute, but they did not, as do the defendants here, insist that under it they could justify negligence. They averred in the defence that they caused the water to flow by the authority and in due execution of their statutory powers, and without any negligence on their part, and their contention at the trial was that their omission to scour the natural bed of the river was not negligence on their part; because, as they contended, they had no power under the statute to do so. The Queen's Bench sustained a verdict for the plaintiff, and their judgment was reversed by the Exchequer Chamber, whose decision was, in its turn, reversed in the House of Lords. The opinions of the learned lords in that case enter at great length, and with much clearness, into this question. The Lord Chancellor (Lord Hatherley) having, on a consideration of the Act, arrived at the conclusion that under it the defendants had the power of cleansing the Muddock, proceeds thus (1) :—

"If they have this power of cleansing it and making it proper and sufficient, the question is, while so using it as they have chosen to use it, for conveying water into the river Bann in the regular and constant supply which is thought desirable by the Act, whether, so using it, they are or are not bound to make reasonable use of all the powers which they possess, to do the work in such a manner as shall be effective, without damaging the property of any others whose property they may come into contact with in the course of their

(1) 3 App. Cas. 445.

user of this particular channel which they have adopted. It appears to me that when so stated the case becomes really clear of all the authorities which have been cited, and the proposition is brought simply back to that which is stated, as I have already said, by Mr. Baron FitzGerald, namely, whether or not they have so exercised these powers as to avoid negligently doing injury to others."

In other words, he holds that a negligent maintenance of the works, an act of omission, as distinguished from an act of commission, gives a cause of action.

As to the question whether the omission relied upon was in law an act of negligence—that is, an omission which was a breach of duty due by the defendants to the plaintiff—the Lord Chancellor adds (1):—

"And if they have the power of so cleansing it, it appears to me . . . that [to] a person who is injured by their introducing the water in the manner in which it has been introduced, that is to say, not by a natural flow, and in such times and in such quantities as it had been accustomed to come down the Muddock, but in the quantities and at the times required in order to carry out the duties imposed upon them by the Act of Parliament, [they] were bound to keep clear the channel they had so provided and used, in order that they might not, by reason of the additional amount and quantity of water they so sent down, and by reason of the mode and times in which they sent it down, occasion the damage which has been occasioned to the plaintiff."

Later on, he adds (2):—

"We are not bound, nor entitled, to suppose that they will wilfully do injury by the exercise of the legislative powers which have been given to them; but it appears to me clearly and plainly that they should use every precaution, by the exercise either of their powers created by the Act of Parliament itself, or of their Common Law powers, to prevent damage and injury being done to others, through whose property the works or operations are to be carried on, and to avoid subjecting them to consequences which they were not bound to anticipate from the Act of Parliament, seeing that the Act also enabled the parties who had the power to do so to prevent the mischief."

Lord Selborne says (3):—

"It appears to me to be clear that if by this Act of Parliament power is given to the defendants to convey by this particular channel to the river *Bann* a supply of water which would not otherwise in the same manner naturally pass down that channel, and to do all things proper and necessary for the conveyance and regulation of such supply of water, that power does not enable

(1) 3 App. Cas. 447. (2) *Ibid.* 449. (3) *Ibid.* 452.

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or authorize them to flood the lands of the neighbouring proprietors *unless* it would be *impossible* to avoid or prevent such flooding by any reasonable and proper use of their statutory powers. For this proposition I do not think it necessary to cite authority; but I may say that it appears to me to be consistent with all the authorities which have been referred to, and to rest upon very evident grounds of reason, justice, and law"

Lord Blackburn says (1):—

"I take it without citing cases, that it is now thoroughly well established that no action will lie for doing that which the Legislature has authorized, if it be done without negligence, although it does occasion damage to anyone; but an *action does lie for* doing *that* which the Legislature has *authorized, if* it be *done negligently*. And I think that if by a reasonable exercise of the powers, either given by statute to the promoters, or which they have at Common Law, the damage could be prevented, it is, within this rule, "negligence" not to make such reasonable exercise of their powers. I do not think it will be found that any of the cases (I do not cite them) are in conflict with that view of the law."

These judgments render it impossible to sustain the contention of the defendants here. They establish two propositions in the clearest language: first, that if a statute authorises an interference with a previously existing right of an individual, the negligent exercise of the powers so conferred gives a cause of action, and is not justified by the statute—that the justification afforded by the statute is for the due, reasonable, and careful—not for the negligent—exercise of the powers. Secondly, as to what is negligence—that where you have the power, by the exercise of the rights you possess under the Act of Parliament, to do an act in such a way that it will not cause injury, then the doing it in a way that does cause injury is an actionable wrong, because it is not justified by the statute. In the present case it is found that if these accumulations had been cleared away this damage would not have happened. The defendants had power, under the statute, to clear them away; they had power under the statute to provide funds for paying for that work; and therefore, unless we are to ignore the law laid down in *Geddis* v. *The Proprietors of the Bann River Reservoir* (2), we must hold that this action lies.

I desire here to remark that the able counsel in that case did

(1) 3 App. Cas. 455. (2) *Ibid.* 430.

not venture even to suggest the proposition that negligent acts could be justified under the statute in question there. Their argument in the House of Lords followed the allegation in their defence, and was, not that they were excused for negligence, but that the omission complained of was not negligence, because they had not legal power to do the act omitted.

It is said that the decision in *Geddis* v. *The Proprietors of the Bann River Reservoir* (1) is inapplicable here, because there the defendants had the power from day to day to regulate the quantity of water they sent down; whereas it is alleged that here they had no power to regulate the flow, which it is said resulted from the operation of natural causes upon the fixed erections of the defendants. But the flow is as much affected by the channel of the stream being either choked and narrowed by the accumulations, or by its being kept clear, as it is by the fixed erections. In both cases—that in the Lords and here—there was power to prevent the damage, by the cleansing of the river; and the principle involved is as applicable in the one case as in the other.

In that case the statute was relied upon, as it must be here, as a justification for the acts done. The decision was that as the flooding of the plaintiff's land could have been avoided by a due exercise of the powers vested in the defendants, it was not authorised by, and could not be justified under, the statute; and that it was therefore an act of trespass. The action was not framed for breach of a duty imposed by the statute, but the plaintiff defeated the alleged justification, by showing that it did not extend to an act which could have been prevented by due care. This consideration answers all the defendants' arguments here. They say that the only ground on which the action could be sustained is for breach of the statutable duty to cleanse; that that duty was a public and not a particular duty; that the act was one of omission only, and that for such a breach of a public duty an individual who sustains damage cannot sue. For this they cite a long line of cases, commencing with *Glossop* v. *Heston and Isleworth Local Board* (2), and extending to *Robinson* v. *Workington Corporation* (3). I wholly

(1) 3 App. Cas. 430. (2) 12 Ch. D. 102. (3) [1897] 1 Q. B. 619.

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decline to enter upon the consideration of those cases. They have no application whatsoever to the matter in hand. The wrong done to the plaintiff here is something wholly different from a breach of a public statutable duty. To suggest that it is for a breach of a public statutable duty involves a confusion of elementary principles. It is for the invasion of a private common law right. The statute has nothing to say to the cause of action, except to take it away, if the act can be justified under it. It does not give the cause of action. This consideration is also an answer to the second argument of the defendants' counsel, in reference to which another long line of authorities, commencing with *Atkinson* v. *Newcastle Waterworks Co.* (1), and extending down to the latest period, was cited, that where a right is conferred by statute, and a special remedy is given by that statute, you must resort to that remedy, and cannot sue otherwise. The remedy suggested here is that given by 29 & 30 Vict. c. 49, s.2, under which some other person, but not the plaintiff here, might have made an application to the Local Government Board, which might have resulted in preventing mischief of this sort for the future. The argument is that therefore the plaintiff, who is not entitled to go to the Local Government Board, is without remedy in respect of the damage that has already accrued to his land.

I conceive it to be a libel upon the law of this civilised country to suggest that such a conclusion flows from it. But, fortunately, the suggestion cannot be sustained. This class of case has no application, save when the plaintiff is suing upon the statute. In *Atkinson* v. *Newcastle Waterworks Company* (1) the cause of action was that water, which it was the duty of the defendants to provide under a local Act, was not supplied, and therefore the fire was not subdued. But, if the Act had not been passed, the water would not have been there; and therefore the right of the plaintiff, if any, was a right created by the statute, and not a right existing, as it does here, independently of the statute. I agree that in that case the plaintiff, as an individual, did not acquire a right of action. The right was a public right, by which I mean a right acquired by that *ens rationis*, the public at large—the public, in

(1) 2 Ex. D. 441.

the sense in which it is represented by Her Majesty. There was no right given to individuals. The public right, but for the remedy provided by the statute, could have been made the subject of indictment, and possibly of *mandamus*; but as there was a special remedy provided in the same statute which conferred the right, that right was not capable of being asserted in the ordinary mode known to the common law, or otherwise than in the mode provided by the statute.

I have said so much in the hope of explaining the view which struck me from the time this case was opened, that there has been some unfortunate misconception of the real nature of the cause of action here; that this mass of cases upon which the defendants have relied—all of them cases of the highest authority, which if applicable we should have followed with deference—have no bearing upon the case before us. From them I go back to the naked proposition with which I started. The acts done here would have given the plaintiff a cause of action, if it were not for the statute. The statute alone can prevent the defendants from being found liable in damages. But that statute does not afford a justification, as the justification under it applies only to acts done under the statute with due care, not for acts done negligently. The acts which constitute the cause of action here are, upon the facts found by my brother Johnson, in law, negligent acts: therefore this action lies.

O'BRIEN, J.:—

Owing to the fact that drainage schemes may be supposed to relieve land of water, rather than to flood them, and perhaps also because the incidental mischiefs that arise from them occur after lapse of time, no recorded instance has occurred in which the question was raised, whether an action at law could be maintained against the Board by persons within the district, if we except the case which we have examined from the files of the Court—*Gleeson* v. *Kilmasthulla Drainage Board* (1) —which we must regard as a precedent for the maintenance of the action. As to the case of a person outside the drainage area, that rests upon the express saving of the sta-

(1) Unreported.

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tute, even as to acts directly authorised by the scheme. In the case in which the action was maintained, the defence that the plaintiffs were lessees or proprietors, and were confined to the remedy provided by the 29 & 30 Vict., was held to be bad—which was treated as furnishing a cogent argument that the class of occupiers, who possessed no other remedy, could not be in a worse position. But it seems to be certain, on the other hand, that if persons having permanent interests—who were alone liable to be assessed, and who were considered perhaps to represent all the interests in the land, so that no account was taken of the occupiers—were deprived of the remedy by action, it would be impossible to hold that the occupiers could retain it, that there could be an action for injury to the possession, and none for that to the reversion of the same land—besides that the proprietors might be themselves occupiers. The distinction of the class, therefore, whether in favour of or against the action, must be entirely rejected. But the words of the Act itself give no support to the idea that the interference of the Local Government Board was intended to be an exclusive remedy. For, after candidly stating in the preamble as one of the motives of the legislation, that the security for the Treasury advances was in danger of being prejudiced if the works were not maintained, the Act goes on to say that it is expedient to make "further provision for the future maintenance of the drainage," which of course has nothing to say to the damages for past injury, any more than a *mandamus* at the common law. No one can say that these words have the effect of excluding the remedy by action. We may therefore lay the argument of another remedy provided by the statute out of the question. The principle is admitted, that where a new right comes into existence with the remedy, the party must abide by that remedy alone. But here the stress of the question is, that (it is contended) it is not a new right, but that there was an antecedent right which is infringed—the right to have water flow in its natural course and volume—that the authority given by the statute is subject to an inherent condition to maintain the drainage properly, and that at the least there is a duty to maintain it, for the breach of which an action lies. On the other hand, it is said that, if there was a right antecedent to the drainage, the

remedy now claimed was not attached to it, for that there was no obligation on a person above or below the plaintiffs to scour the stream, either to admit the water to flow, or to prevent its being penned back. It seems to me that the view of the right to maintain an action is assisted to some degree by the form the action would assume in pleading, some of the distinctions in which must still follow the law. I should be of opinion it could not be an action of trespass—which would be the case if the failure to scour had the effect of making the act of the Board illegal—as it would be in the case of a person diverting or penning back water—but would necessarily be an action for negligence in not performing the duty that lay upon the Board under the statute. Though I cannot but see ground for contending that the misdirection or misuse of a continuing natural agent, attended by such a breach of duty, removes the case from the distinction between misfeasance and nonfeasance, and is an instance, entirely new, which that distinction, if otherwise well founded, does not meet—I am of opinion, with respect to the question of duty, that there was a positive duty on the part of the Board to maintain the bed of the stream. They were constituted to drain a certain district. They were made a corporation, and destined to continued existence. They were authorised to interfere in several ways physically with the drainage, and were required to levy rates for the expense. They were to improve the lands, and for that purpose to regulate and manage what, within bounds, was a beneficial agent, and outside them a dangerous enemy. It was contended that the Board had merely a power and not a duty, and for that proposition the appeal before the Privy Council in the year 1895 was cited. But that was a case of change of authority, on which it was held that the power only, and not the duty, was transferred. *Geddis' Case* (1), however, in the House of Lords, sustaining the opinion of the dissenting Judges, pronounced by the Chief Baron, and affirming the decision of the Queen's Bench, is an express authority that, out of circumstances almost exactly analogous, and, if at all different, not so strong as those in the present case, a duty arises, and for the non-performance of that

(1) 3 App. Cas. 430.

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duty an action lies; and I cannot see how, without disobeying that case, we can hold the defendants were not liable. The latest example that was referred to of the rule that where a duty is created by statute, and a remedy given for the breach of that duty, *Robinson* v. *Workington Corporation* (1) does not apply, for the present case is not within the terms of either branch of the proposition, because all the instances of the application of that rule are instances, not merely of a new duty, but also of a new right, and the remedy given by the 29 & 30 Vict., in express terms, is "a further provision," and is confined to "the future maintenance" of the drainage, though the insufficiency of the remedy as not providing for past damages would not be an objection in the cases to which the rule applied. All the cases cited for the defendants can stand with the House of Lords' decision in *Geddis' Case* (2), and are outside it. And all the instances referred to for the distinction between nonfeasance and misfeasance are broadly distinguishable from the present, as not containing the element of previously existing right—the right to have the water flow in its natural course—with which the statute, no doubt, gives the power to interfere, but with a correlative provision against any injurious consequences. The natural right existed before the drainage, though without a remedy from accretions arising from natural causes; and the law in allowing an artificial course to be substituted, has at the same time introduced a remedy to meet the state of things thus created. It is the principle of this difference that gives rise to the expression which is to be found in the case, that the duty is created to the district and not to the individual, for the reason that where there is no previous right, there can be no individual enjoyment. The case must go entirely, in my opinion, upon the antecedent natural right, not extinguished otherwise than with the attendant means of prevention provided by the statute, and upon the duty to adopt those precautions, as established by the House of Lords in *Geddis* v. *The Proprietors of the Bann Reservoir* (2). That case, separated from circumstances which do not affect the principle, is the present one, and must stand unchallenged, and any cases that are inconsistent with it must fall around it.

(1) [1897] 1 Q. B. 619. (2) 3 App. Cas. 430.

JOHNSON, J. :—

When these appeals came before me at the Assizes, I considered the questions of law involved in them serious and far-reaching in result: and such as could not be conveniently dealt with on circuit, where it was not possible to have access to the numerous authorities to be culled from the text-books. Therefore, after hearing the evidence, and without deciding the points in issue, I proposed to the counsel either to adjourn the cases to Dublin for argument before myself: or to have a case stated for a Divisional Court. The defendants' counsel chose the latter course. Accordingly the case was stated, and the questions raised by it are now before this Court for decision. Apart from any statute, it is the plaintiffs' right to have the natural flow of the main river in its natural state and condition; but under the authority conferred on them by the 26 & 27 Vict. c. 88, the defendant Board have, by their drainage works, straightened, widened, and deepened the main river—brought into it, by artificial cuts, the waters of the Prosperous river (which formerly flowed elsewhere), and cleansed out the beds and channels of the main river and its tributaries. By these works, lawfully executed by the defendant Board, the volume and velocity of the flow of the main river has been materially altered and increased, and the plaintiffs' rights to this extent interfered with; but, so long as the defendant Board duly maintained their drainage works in order, all this water was discharged by the bed and channel of the main river without injury to the plaintiffs, or any other person. For some years these works were so maintained by the defendant Board; but latterly they have not cleansed, and have not provided funds adequately sufficient with reasonable care to cleanse, the river bed and channel. It has in consequence become choked with mud, silt, and weeds, and incapable of discharging the water continuing to flow in it by the defendants' works; and the water thus penned back flooded and injured the plaintiffs' holdings.

There is no question as to the cause of the injury. The question is whether the defendant Board owed any duty to the plaintiffs to maintain their drainage works in a reasonably efficient condition to receive and carry away this water; and if so, whether the plaintiffs can sustain the present actions for

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breach of such duty, resulting in loss and damage to the plaintiffs. The statute, from which the defendant Board derives authority to interfere with the plaintiffs' right to have the river and its flow in the natural state, provides that (1) "*For the purpose of effectually maintaining and upholding, in all cases in which works shall be executed under this Act, all and singular the drains, watercourses, banks, and other works . . . and for the payment of all necessary expenses of maintenance of works of drainage . . . and all other expenses incident thereto*, and all costs, charges, and liabilities from time to time properly incurred by them in the execution of the provisions of this Act, it shall be lawful for the Drainage Board, *and they are hereby respectively authorised and required*" once a year to meet and "determine and fix the sum of money that shall be contributed and raised during the then ensuing year for the purposes of effecting, sustaining, supporting, and upholding all and singular the aforesaid works, and for other the purposes of this Act." The proper means for maintaining drainage works authorised by the statute vary with the nature of the particular work in question. A river bed or channel is maintained in an efficient condition to carry off the flow of water by cleansing it with reasonable care; and though some doubt was at one stage of the argument suggested, it has not been, nor could it, I think, be successfully contended that under the statute the defendant Board does not possess the power to do, and to continue to do, what they did for some years, viz. maintain their drainage works in efficient condition by cleansing the river (which they have lawfully altered and used, and continue to use, to carry away the water flowing in it by their drainage works), in such manner as that the water should flow away without injury to the plaintiffs' holdings. Having this power, the decision in *Geddis' Case* (2) establishes that the defendant Board is bound reasonably to exercise it, and to cleanse the river bed, and that their omission to do so (the nonfeasance on which they rely) is "negligence," viz. doing negligently that which the statute authorised to be done without negligence (3). At the place in question the river bed

(1) 26 & 27 Vict. c. 88, s. 57.

(2) 3 App. Cas. 430.

(3) See Lord Hatherley, p. 445; Lord Selborne, p. 452; Lord Blackburn, p. 456.

should, with reasonable care, be cleansed annually, and this might be effected at a cost of about £10 (though the requisite sum for this purpose does not, I think, affect the question at issue). The defendant Board is empowered by statute to provide sufficient funds for this purpose. They have not done so; in fact, they have declined to exercise their powers reasonably, and to raise sufficient funds for the purpose; and in consequence the river has been choked, and the plaintiffs' holdings injured. It appears to me, therefore, that a duty is, in this respect, owed by the defendant Board to the plaintiffs: that the defendant Board has been negligent in performing that duty, and that, by such negligence, and as the immediate consequence of it, the plaintiffs have been damaged, and, for people in their condition of life, seriously damaged. For this wrong and injury, and the damage thus sustained, the defendant Board contend that the plaintiffs are without remedy; they argue that they (the defendant Board), when once they have lawfully executed the specific drainage works in the first instance, are not liable to the plaintiffs in a civil action for damage and injury to the plaintiffs arising from the omission of the defendant Board to keep their works in order. For this proposition numerous cases have been cited; but in none of them was it held—nor do I gather from any of them any ground on which, in such circumstances as those of the present case, it could be held—that these actions are not maintainable. In the present case the defendant Board cannot justify interference with the plaintiffs' rights in the natural river, except under the authority of the statute; but that only authorised such interference with the river by specified works as with reasonable care would carry, and continue to carry away, the water in it, and gave adequate powers to provide means for the purpose. For this the Board was established, and this is the condition of its existence. If they had pursued their statutable authority with reasonable care, the plaintiffs, even though injured, would have no remedy for their injury: they would have sustained no legal wrong. But when they have not pursued their statutable authority; when, having power to cleanse the river and maintain the channel in a state to carry away the water, and to provide sufficient funds for the purpose, they have not exercised those powers reasonably—in fact, have declined to provide reasonably

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sufficient funds for the purpose—then they have been negligent within the principle established by *Geddis' Case* (1), and have committed a breach of the duty they owed to the plaintiffs not to interfere with their rights otherwise than as the statute authorised; and by their negligence damage has been inflicted on the plaintiffs. This is an actionable wrong for which the defendant Board is responsible; and for these reasons I think these actions are maintainable.

Solicitor for the plaintiff: *James Kennedy.*
Solicitors for the defendants: *Stanuell & Son.*

A. E. R. J.

(1) 3 App. Cas. 430.

GLENNY, LANDLORD; BELL, TENANT (1).

Appeal.
1897.
Nov. 2, 3.
Dec. 17.

Landlord and tenant—Fair rent—Fee-farm grant—Land Law (Ireland) Act, 1887—Redemption of Rent (Ireland) Act, 1891.

By indenture of lease, dated 9th March, 1874, in consideration of a fine of £1300, G. demised to B., his heirs and assigns, the lands of D. for three lives, with a covenant for perpetual renewal, subject to the rent of £100 per annum. On the 23rd September, 1874, G. made to B. a fee-farm grant of the lands at the same rent. The lands had formerly been let at a higher rent. In 1895 the grantee served notice to redeem the rent; the landlord declined to consent, and the case came before a Sub-Commission to fix a fair rent.

Held, on the facts of the case that the Land Commission, in fixing the fair rent, ought not to make a deduction from what would otherwise be a fair rent by reason of the payment of the fine of £1300.

ROBERT GLENNY, the father of the landlord, purchased the lessee's interest in a lease for lives renewable for ever in the lands of Dromart, in the county of Armagh, for £2,575 in the Incumbered Estates, and obtained a conveyance of them dated the 30th January, 1856. Shortly after 1856, the lands were let by Robert Glenny to a tenant named Todd, at the rent of £170 per annum. Todd surrendered his interest in 1869. The lands were again let from year to year on the 25th February, 1870, at the annual rent of £180, to a tenant named Holland, who remained in possession for three years, and the lands were thereafter and until the 9th of March, 1874, in the landlord's hands.

By indenture of lease, dated the 9th March, 1874, Robert Glenny, in consideration of a fine of £1300, demised to Benjamin Bell, his heirs and assigns, the lands of Dromart for three lives, with a covenant for perpetual renewal, subject to the rent of £100 per annum. By indenture dated the 23rd September, 1874, between Robert Glenny and Benjamin Bell, after reciting the conversion of the landlord's interest into a fee-farm grant, the said Robert Glenny, in pursuance of the provisions of the Renewable Leasehold Conversion Act, granted the said lands to Benjamin Bell, his heirs and assigns, for ever at the yearly fee-farm rent of £100.

(1) Before LORD ASHBOURNE, C., and FITZGIBBON, WALKER, and HOLMES, L.JJ.

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Isaac Bell, the tenant, was the son of Benjamin Bell, and was entitled to the interest of his father in the said lands, and Robert Edward Glenny, the present landlord, was the owner of the fee-farm rent of £100.

On the 6th September, 1895, the tenant served an originating notice under the Redemption of Rent Act, 1891, to redeem the fee-farm rent, and on the landlord declining to consent to the redemption of the rent, the case came before a Sub-Commission to fix the fair rent of the holding, and by an order dated the 19th December, 1896, the fair rent was fixed at £70. As stated in the 6th par. of the case stated, in arriving at this rent of £70 the Sub-Commissioners treated the payment of the £1300 on the occasion of the granting of the lease of the 9th March, 1874, as having been made for a part purchase of the lessor's interest in the said lands, and on that ground they considered that of the annual rent of £96, which they estimated as the fair rent of the holding, the tenant was entitled to a deduction of £26 per annum, representing the proportion between the fine of £1300 and what they estimated to be the capitalised value of the holding when the lease was made.

Both parties served notice of re-hearing and on the hearing before the Land Commission the landlord stated that in 1874 his father, Robert Glenny, being anxious to let the lands, demanded from several applicants for the farm a rent of £200, and that his father believed the place to be worth that rent, and offered to anyone who applied for the farm to allow him £5 off this rent for every £100 paid, and that after certain negotiations between his father and Benjamin Bell, it was agreed that the rent should be £100, and should be reduced to that amount in consideration of £1300 paid to the said Robert Glenny by the intending lessee, and the landlord also stated that pursuant to this arrangement, the fine was paid to Robert Glenny, and the lease (of the 9th March, 1874) for lives renewable for ever was executed.

The Land Commission were of opinion (9th par.) on the evidence that the payment in question differed in no respect from an ordinary fine paid by a lessee on the granting of a lease, and that in the present case it was paid by Benjamin Bell, for the purpose of acquiring a perpetual or *quasi*-perpetual interest in the lands at a rent substantially lower than what, at the date of the lease, was

the fair letting value of the lands, and that under the circumstances it was not obligatory in fixing a fair rent of the holding to make any deduction in respect of the fine so paid. The Land Commission were of opinion, that the fair rent of the holding should be fixed at the annual sum of £96, but at the request of the tenant's counsel they stated this question for the decision of the Court of Appeal—Whether, in fixing the fair rent of the holding in this case, the Court was bound as a matter of law to make a special deduction from what would otherwise be the fair rent by reason of the payment by Benjamin Bell to Robert Glenny of the sum of £1300 on the granting of the lease of the 9th March, 1874?

T. M. Healy and *W. H. Brown*, for the tenant:—

The £1300 was paid to fine down the rent, and what the tenant did was to purchase part of the landlord's interest. The landlord's counsel never argued the question whether the perpetuity is gone or not. In common sense, the fine ought to be taken into account. It is like a price given for tenant right, except that it was given here to the landlord, instead of an outsider. But the change effected furnishes a stronger ground in the tenant's favour. The tenant had formerly the tenure under a fee-farm grant; he gets a much lower tenure by fixing a fair rent. He gives up the right to assign or sublet; he has lost the mines and minerals; the landlord may get the rent raised in fifteen years, and if the fair rent is fixed the landlord can buy at the true value. *Lanyon* v. *Clinton* (1) governs this case. *O'Neill* v. *Cooper* (2) is also in our favour.

Bates and *Hume*, for the landlord:—

Lanyon v. *Clinton* (1) does not apply. There it was held that the consideration being gone for which the money was given, they were entitled to take that into consideration in reducing the rent. Here the tenant has received the consideration for his money. The lease here, or fee-farm grant, has run its full course and has expired, and no term of the letting on the occasion of the making of the fee-farm grant can still be considered to be in existence: *Mairs* v. *Lecky* (3); *M'Geough Bond's Estate* (4). The money was paid in the ordinary

(1) [1895] 2 I. R. 150.
(2) Unreported.
(3) [1895] 2 I. R. 475, 491.
(4) M'Dev. 109.

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sense in which a fine was paid, once it has been found that the money was paid to fine down the rent, and the Land Commission cannot take it into account in fixing a fair rent.

LORD ASHBOURNE, C. :—

[After stating the facts of the case as stated in the special case.]

The question asked must be taken in connection with the facts stated, which raise no abstract question, but require a decision between the conflicting views of the Sub-Commission and the Land Commission—between the view put forward by the case in its 6th paragraph and the opinion of the Land Commission itself as stated in the 9th paragraph.

Mr. Healy in arguing the case, wisely, in my opinion, refused to rest his contention upon the view of the Sub-Commission, or to press for the adoption of the alternative, or the argument mentioned in the 6th paragraph. He prudently only asked that the Sub-Commission should be at liberty to consider—should not be debarred from considering—for what it might be worth, and regardless of whom it might assist, the fact that the £1300 had been paid.

It would not, however, be reasonable for us to ignore the real substantial topic involved in the case—which desires the question to be answered as explained by the particular facts of the case—*i. e.* whether in fixing the fair rent in this case the Sub-Commission should have taken into account the fine of £1300. I answer no abstract question; I deal with this case alone on its own facts.

The position of a fee-farm grantee under the Redemption of Rent Act, 1891, adopting the alternative of applying to have a fair rent fixed, is stated with precision in the case of *Mairs* v. *Lecky* (1). He is enabled to make the same application as the prescribed lessees might make under the Act of 1887, which is to antedate the expiration of a lease, and apply as if he was a lessee under the 21st section of the Act of 1881—that is, a lessee who at the expiration of his lease applies to have a fair rent fixed. Therefore a fee-farm grantee who elects to apply to have a fair rent

(1) [1895] 2 I. R. 475, 486.

fixed, by his own act claims to have his fair rent fixed as if his grant had expired. It is all his own act. If he paid a fine--*bona fide*, and under circumstances like the present—he got what he paid for, in length of tenure and amount of rent. Here the grantee paid his £1300 for a fee-farm grant at £100 a-year. He got in duration and amount what he paid for. He by his own act elects no longer to be bound, and seeks to have a fair rent fixed. The Redemption of Rent Act permits it, but on the facts of this case it would be impossible to allow the fine, given for another purpose, and for which he has got the stipulated consideration, to be taken into account in fixing the fair rent.

The point came before the Land Commission in the case of *Mollan* v. *Kieran* (1) when Mr. Justice Bewley said :—"When in the granting of a lease a fine has been paid, either for the purpose of obtaining the security of a term or for the purpose of obtaining a letting at a reduced rent, or partly for one of these purposes, and partly for the other, I fail to see how the payment can be deemed a ground for reducing the rent."

In my opinion the answer to the question should be "No"—on the facts stated, in fixing the fair rent of the holding in this case, no deduction should be made from what would otherwise be the fair rent by reason of the payment of the sum of £1300 on the granting of the lease of 9th March, 1874.

FITZ GIBBON, L.J. :—

I concur. The ground of my decision is stated in my judgment in *Mairs* v. *Lecky* (2), where I traced the course by which a fee-farm grantee becomes entitled to the rights of a "present tenant" back to the Act of 1881, sect. 21. By the Redemption of Rent Act, 1891, sect. 1, occupying fee-farm grantees are classed with lessees under leases to which the Act of 1887, sects. 1 and 3, do not apply "by reason of the period of their expiration, or by reason of their being renewable or *perpetual*." The right first given is the right to apply to redeem the rent, but if the landlord does not consent to redeem, the tenant gets certain other rights. He—(*a*) "shall be deemed to have made the prescribed

(1) [1894] 2 I. R. 34. (2) [1895] 2 I. R. 486.

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application under the Act of 1887, sect. 1"; and—(*b*) "shall be held to be a tenant of a present tenancy in manner and subject to the conditions and right of resumption mentioned in the Act of 1881, sect. 21, as modified by the Act of 1887, sect. 1." For "the prescribed application" we must go to the Act of 1887, sect. 1, and there we find that the applicant must be a lessee who at the expiration of his lease "would be deemed to be a tenant of a present ordinary tenancy from year to year *within the meaning of the Act of* 1881," and his right is to "be deemed to be a tenant of a present tenancy in like manner and subject to like conditions *as if his lease had expired*," and his holding becomes "subject to all the provisions of the Act of 1881 with regard to present tenancies *as if the tenancy therein were a tenancy from year to year.*" This takes us back to the Act of 1881, sect. 21, as the foundation of the whole thing, and under that section existing leases are to "remain in force to the same extent as if this Act had not passed"; but *at their expiration* the lessee, if *bona fide* in occupation, shall be deemed to be a tenant of a present ordinary tenancy from year to year, at the rent and subject to the conditions of his lease, so far as such conditions are applicable to a tenancy from year to year. It is not for us to speculate as to the reasons for the exclusion or inclusion of any particular class of tenants, or for the limitation of the rights conferred upon them, but it is clear that the only position that can be occupied by a tenant coming in either under the Act of 1887 or under the Act of 1891, is that of being deemed to be a tenant coming in "at the expiration" of his lease under the Act of 1881, sect. 21. His position must therefore be the same as that of a lessee coming in after the expiration of a term, subject to the conditions of his lease, and therefore he cannot have taken into account, in reduction of his subsequent fair rent, money paid as a consideration for the "lease" which he must be deemed to have held and enjoyed until its expiration.

Referring to the special case, we have to point out that we do not give any abstract or general answer to the question put—namely, whether in fixing the fair rent of the holding in this case, the Land Commission was *bound* as a matter of law to make a *special* deduction from what would otherwise be the fair rent by reason of

the payment of the fine? Since this case was argued, we have declined in *Brown* v. *M'Brien*(1) to answer an abstract question where the special facts were not fully stated, and the answer to which might be of general application, but here the facts stated enable us to answer the concrete question in the negative, and to say that, upon the facts stated, in fixing the fair rent of the holding in this case, the Land Commission not only were not bound, but, as a matter of law, ought not, to make any deduction from what would otherwise be the fair rent, by reason of the fine paid by Benjamin Bell to Robert Glenny on the granting of the lease of 1874.

WALKER, L.J.:—

Counsel for the tenant has not argued the affirmative of the actual question submitted by this case, and no counsel could argue it as presented, and it seems hardly reasonable that the Court should be troubled with the consideration of such a question.

In *Lanyon* v. *Clinton* (2) this Court laid down that it was only as one of the circumstances of a case a fine could be taken into account, and under those circumstances I should have preferred to merely answer the question put, while stating at the same time our opinion of its inutility. However, the case is here, and all the facts are before us, and, probably, it is more advantageous to the parties to treat the case as if it came upon appeal, and give our opinion as to whether a fine should, in this case, have been taken into account by way of reduction from the otherwise fair rent. Confining myself strictly to the case before me, I agree in the result the other members of the Court have arrived at. The position of a grantee under a fee-farm grant, who gets a fair rent fixed, and his *status* to have it fixed, are dealt with in *Mairs* v. *Lecky* (3). The Chief Baron there says (p. 485), and I refer to his judgment because he is not sitting with us:—"The words of section 1 are 'shall be deemed to have made the prescribed application under section 1 of the Act of 1887, and shall be held to be a tenant of a present tenancy in manner and subject to the conditions mentioned in section 21 of the Land Act of 1881,' 'as modified by section 1 of the Act of 1887,' or, reading in this latter section 'as if his lease

(1) Unreported, Michaelmas Sittings, 1897. (2) [1895] 2 I. R. 150.
(3) [1895] 2 I. R. 475.

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had expired.' In other words, the statute made determinable, and treated as actually determined, the perpetual estate conveyed by the grant, converted the grantee into a lessee who *had* held under an expired lease, and thus attributed his occupation under the grant to an assumed lease, which was to be deemed to have expired."

This construction enables the grantee to have his interest in permanent buildings and reclamation of waste lands as improvements taken into account, but it has a different effect against a grantee, such as Bell is, on the question of taking into account a fine. Now, confining myself, even in a redemption of rent case, to one where the facts are as they are here, I think the assumption on which the grantee's right is based, makes it impossible to say that the grantee applying has not received to the full all the benefits, both in duration of tenure and reduced rent, which his tenure conferred—a tenure which, by his own voluntary act, he exercises the option of bringing to an end. The Redemption of Rent Act is a curious piece of drafting. I believe it was not prepared by any responsible lawyer; we can only construe it as we find it. I express no opinion as to the case of a fine taken in circumstances, not like the present, on a fee-farm grant made, or a fine taken on the granting of a lease, or, as to the propriety of the decision in *O'Neill* v. *Cooper* (1). When such a question arises the circumstances will have to be considered, and probably the provisions of section 10 of the Act of 1896 taken into account. Another question was raised during the argument, on which the opinion of Mr. Justice Bewley, and the decision of the Master of the Rolls in *M'Evoy* v. *M'Evoy* (2), appear to be in conflict. I forbear to express any definite opinion on that subject, or, till necessary, face the difficulties which will arise in considering the position of, say, a doweress, a widow of a former owner of the fee-farm, or a mortgagee in fee of the fee-farm interest.

HOLMES, L.J.:—

The question, with which the case stated concludes, has been criticised by Mr. Healy, upon the ground that this Court is asked by it to affirm or negative a proposition that is not in controversy.

(1) Unreported. (2) [1897] 1 I. R. 295.

While arguing that the payment of a fine by the tenant on the granting of a lease ought to be taken into consideration in fixing a fair rent as one of the circumstances of the case and holding, he does not claim that the result of such consideration would necessarily be to reduce the fair rent below what it ought to be fixed at, if no fine had been paid. He admits that it might be proper and legitimate to reject it altogether as an element in the calculation; and he even adds with humorous exaggeration that the Land Commission might find in it a reason for making the fair rent higher than the rent agreed on in the lease. I think that the fallacy of this criticism is that it deals with the question as if it were an abstract legal query, instead of taking it in connection with the statements that precede it, and regarding it as the result of the actual litigation before the Court.

We find, on reading the case, that the Land Commission received evidence in reference to the payment of the fine, and fully considered it; that they ascertained the facts regarding it; that they drew, as a jury, the inference that the fine was paid for the purpose of acquiring a perpetual, or quasi-perpetual interest in the lands at a rent substantially lower than what, at the date of the lease, was the fair letting value; and that they decided, as judges, that the legal consequence of such inference was that no deduction ought to be made, by reason of the fine, from what otherwise would be the fair rent. The tenant, as might be expected, questioned the law thus laid down; and thereupon the case was stated. The same legal proposition has been argued before this Court. It has been controverted by the tenant's counsel, and supported on behalf of the landlord. I am sure that it is what was intended to be submitted to us by the Land Commission, as well as by the parties; and I am of opinion that on the true construction of the whole case, it is the only legal question that can be deduced from it. I therefore proceed to consider it; and in doing so, I recognize its great importance, not only to the present litigants, but also as involving a principle that must be frequently applied.

This tenant's right to have a fair rent fixed arises under the Redemption of Rent (Ireland) Act, 1891; but to understand its provisions, it is necessary to go back to the principal statute, and

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trace the legislation therefrom through the intervening Act of 1887. In 1881, agricultural and pastoral tenancies in Ireland might have been broadly classified as yearly tenancies, including tenancies for a less period, and tenancies held under existing leases for a term longer than from year to year. The Act of that year excluded from its provisions the last mentioned class as long as the term continued; but on its expiration, provided it would expire within sixty years, the lessee, if in occupation of the holding, was to be deemed tenant of a present tenancy from year to year at the rent, and subject to the conditions of the lease, so far as such conditions were applicable to the new form of tenure, and was to have all the rights conferred by the statute on a tenant of a present yearly tenancy.

In both England and Ireland it is not unusual for the lessee to pay the landlord a substantial sum on obtaining a lease where the term is of some duration. The introduction by conveyancers of the words "without fine or foregift" into a leasing power conferred on a limited owner testifies both to the prevalence of the custom and to the effect which it is supposed to have in settling the rent reserved. As a rule, the consideration for the payment is fixity of tenure for the stipulated period at a rent lower than it would otherwise be. It is possible that in some instances there is an additional element of consideration. It is indeed not easy to conceive such a case, at least where the lease contains the usual covenants, and is drawn in the common form; but unexpected variations in the dealings between landlord and tenant frequently present themselves; and it is prudent to leave these abnormal deviations to be dealt with when they arise. For my present purpose, I confine myself to a fine given in exchange for a substantial term at a comparatively low rent, and for that alone.

Now assuming that such a term expired last year, and the lessee in occupation were to apply to the Land Commission to fix a fair rent, ought this fair rent to be less than it would have been if no fine had been paid? I apprehend that this question must be answered in the negative for one obvious reason (not to speak of others), that the consideration had been received and exhaustively enjoyed. No doubt the Legislature, by the 21st section of the Act of 1881, has conferred upon the tenant a right inconsistent with the terms of

the lease; and to that extent the contract made by the parties has been nullified. But there is nothing in this section, or in any other provision of the Land Code, enacting either directly or inferentially that a sum of money which was paid for the purchase of a limited and definite advantage is to be regarded in the administration of the Acts as having been paid for something either more extensive, or wholly different. I therefore start from the proposition that where a fine has been paid for the purpose of acquiring a term at a rent lower than what, at the date of the lease, was the letting value, and for no other purpose, and where such term has expired since the Act of 1881, the Land Commission is not at liberty, in fixing a fair rent of the holding, to make it lower than it would otherwise be by reason of such fine. Whether the fine was wholly paid for the purpose I have mentioned or not is a matter of fact; but once the fact is affirmatively ascertained, the conclusion from it is, in my opinion, a question of law, in the decision of which there is no room for the exercise of judicial discretion in the sense in which that phrase is usually applied.

The next statute to be considered is the Act of 1887. By its first section, a lessee in certain circumstances and subject to certain conditions is entitled, before his lease has expired by efflux of time, to have a fair rent fixed. The mode in which this is carried out is most important. A lessee coming within this section is to apply to the Court within the time limited, and in the prescribed manner. He shall then be deemed to be a tenant of a present tenancy in like manner and subject to like conditions as if his lease had expired; and his holding shall be subject to the provisions of the Act of 1881 with regard to present tenancies as if the tenancy therein were a tenancy from year to year. In other words, he is placed in precisely the same position as a lessee is placed in by the 21st section, on the expiration of the term; and his right to have a fair rent fixed is based thereon. I shall hereafter have a few words to say as to whether the lease of a tenant who takes advantage of this section is actually put an end to; but this seems to me to be immaterial in considering the duty of the Land Commission in fixing his fair rent. If he is deemed to be a tenant whose lease has expired, the circumstances of the case and holding must

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be considered on this assumption with the like result as regards any fine paid as consideration for the demise. No doubt it cannot be said where the term has only ended constructively, and not actually, that the consideration moving to the lessee has been exhaustively enjoyed, and counsel for the tenant has argued that it is neither just nor reasonable to make no distinction between a man who has received everything he bargained for, and a man who has not. In construing any statute, one's own notion of what is just or reasonable is a dangerous guide; and this is especially so in the case of legislation like the Irish Land Acts, the object of which is to make essential alterations in pre-existing rights.

In 1887 as in 1881, the Legislature determined to confer a benefit on leaseholders outside of and beyond their contract. The extent of the benefit can only be gathered from the language of the enactment, which seems to me to define it with unusual precision. I may say, however, that even if I were to construe the section as meaning simply that a leaseholder was thereafter, at his own option, to have the same right to have a fair rent fixed as a present tenant from year to year—and I do not think that a construction more favourable for the tenant than this is possible—I should still hold that the payment of a fine for the purpose of acquiring the lands for the term agreed on at a comparatively low rent, would afford no ground for reducing the fair rent below what it ought otherwise to be fixed at. Consideration given for what the tenant received and for what he is not obliged to give up, can never be converted into consideration for something different in kind, and not contemplated by the parties, without some legislative declaration to that effect.

Having thus traced the legislation that preceded the Redemption of Rent (Ireland) Act, 1891, I am in a position to consider the provisions of that statute. It applies to a grantee under a fee-farm grant or to a lessee having a renewable or perpetual interest whose rent fulfils certain specified conditions. Its primary object seems to be to enable the grantee or lessee, if his landlord consents, to redeem his rent; but recourse would probably be rarely had to its provisions, were it not for what follows on refusal of consent. In such case the lessee or grantee shall be deemed to have made the prescribed application under section 1 of the Act of 1887, and

shall be held to be a tenant of a present tenancy in manner and subject to the conditions mentioned in section 21 of the Act of 1881, as modified by section 1 of the Act of 1887. Why is the right to have a fair rent fixed conferred on the tenant of a perpetual interest in such intricate and complicated language? Is it not clear that the object of the section, as well as its true construction, is to place him in precisely the same position as a tenant under a terminable lease had been put in by the provisions already considered? If so, everything I have said on the subject of a fine applies to him. No doubt the assumption that a perpetual interest has expired, if taken literally, seems absurd; but what is obviously meant in the first section of the Act of 1887 is that the contract between the parties is to be deemed fulfilled or completed; and this is equally intelligible, whether the tenancy is for a term or in perpetuity.

Counsel for the landlord has argued that the grantee's interest under the fee-farm grant still exists, and therefore that he still enjoys the consideration for the fine. I am unable to accept this proposition; and if I thought the landlord's case depended on it, I should decide against him. When in Arbuthnot's satire, Crambe, to show that he was of a more penetrating genius than Martin, his fellow pupil, swore that he could form a conception of a Lord Mayor, not only without his horse, fur gown, and gold chain, but even without stature, feature, colour, hands, head, or body of any kind, he met with but scant encouragement from his tutor. For my part I cannot realise the continued existence of a fee-farm grant after every characteristic of that tenure has been taken away.

Once the grantee has a fair rent fixed, all the terms of the grant disappear, except such of them as are applicable to a tenancy from year to year, and are not inconsistent with the statutory conditions. The grantee cannot assign his interest except in the prescribed manner; he is not at liberty to subdivide or sublet; he may in certain circumstances be served with a notice to quit, and compelled to give up the premises, and the rent is subject to periodic revision. Whether a lease can be said to exist for any purpose after the lessee has made an application under the first section of the Act of 1887, has never, I believe, been

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decided by this Court, and it is difficult to reconcile all the decisions dealing with the subject in Courts of first instance. It is unnecessary for me to examine them, as the conclusion to which I have come in the present case is arrived at wholly irrespective of whether the fee-farm grant has been destroyed or not; but I have not concealed my own opinion, which I am glad to find is in agreement with the judgment of Porter, M.R., in the recently reported case of *M'Evoy* v. *M'Evoy* (1).

I have referred to the only provisions of the Land Code, that seem to me to bear upon the question raised by the case stated. Mr. Healy has called attention to the 10th sub-sect. of the 8th sect. of the Act of 1881, which enacts that money paid for a tenancy otherwise than to the landlord shall not of itself be deemed to be a ground for reducing or increasing the rent of the holding. He argues from this that the statute contemplates a reduction or increase, if the money has been paid to the landlord. If he means that either reduction or increase is the *necessary* consequence, the proposition verges on the absurd. If the Land Commission is at liberty to find in the payment of a fine a ground for results so opposite as increase or reduction, according to varying circumstances, it is surely not precluded from rejecting the fine altogether as an element in fixing the rent when the circumstances are such as to justify this conclusion. If, however, Mr. Healy only means (as I believe he does) that the fact of a fine having been paid by the tenant *may* be an element in ascertaining the fair rent, his proposition is quite consistent with the reasoning which forms the foundation of my judgment.

The same observation applies to section 10, sub-section 2*a*, of the Act of 1896, from which no inference can be drawn more favourable to the tenant than that a judicial rent already fixed *may* have been made low, by reason of a fine or premium. I have not thought it necessary to refer to the authorities that have been quoted, inasmuch as none of them either rules the present case or gives any substantial assistance in determining it. Mr. Healy has satisfied me that the practice of the Land Commission has not been uniform in dealing with this subject; but the question now

(1) [1897] 1 I. R. 295.

comes before this Court for the first time, *Lanyon* v. *Clinton* (1) being for the reasons mentioned during the argument a wholly different case.

Appeal 1897.

GLENNY, *Landlord*; BELL, *Tenant*.

Holmes, L.J.

In conclusion, I desire to say that I am not to be understood as deciding that a fine paid by a tenant for a lease in perpetuity or for a term, can never, under any circumstances, be a reason for making the fair rent lower than what it would otherwise be fixed at. My judgment is directed to the present case, and to all cases like it, where it has been ascertained by the proper tribunal that the fine was paid for the purpose of acquiring the leasehold or perpetual interest at a rent substantially lower than what, at the date of the lease, was the fair letting value of the lands. It is possible, as I have already said, that in some instances the consideration for the fine was either in whole or in part something different from this. I leave such cases to be dealt with, when they arise, nor can I say what the result ought to be until I know the real nature of the consideration.

Solicitor for the landlord: *E. D. Atkinson.*
Solicitor for the tenant: *S. Cunningham.*

R. D. M.

(1) [1895] 2 Ir. R. 150.

Q. B. Div. 1898.

Jan. 19.

REG. (GUINNESS) *v.* JUSTICES OF CO. LOUTH (1).

Summary Jurisdiction—Procedure—Order of Justice authorizing road contractor to enter upon lands—Notice of application to owner or occupier—Form of order—Limit as to time—Grand Jury (Ireland) Act, 1836 (6 & 7 *Wm.* 4, *c.* 116), *s.* 162.

An order of a Justice authorizing a contractor with the Grand Jury to enter on lands for the purpose of procuring materials for the repair of a road should limit such right of entry to a definite period.

Reg. (*Bentham*) v. *Justices of Dublin* (14 L. R. Ir. 443) followed.

Per Johnson and Gibson, JJ., *diss.* Murphy, J. :—An order of this nature reciting the presentment under which the contract was made, and authorizing the entry "for the period in said presentment mentioned," is void.

An order of this nature should only be made on summons or notice, but notice given to a person in occupation of the land under a grazing letting held sufficient.

CERTIORARI. The respondent Justice, Mr. R. Beresford, R.M., sitting at Ardee Petty Sessions on the 11th August, 1897, having heard an application, under section 162 of the Grand Jury Act, 1836, by Patrick Roe, a road contractor, for liberty to enter upon the lands of Townpark, for the purpose of taking therefrom materials for the repair of the road for which he was contractor, made an order giving the authority asked for. This order recited that at the Assizes held on the 3rd day of July, 1897, at Dundalk, for the county of Louth, a presentment was duly made for repair of part of the road leading from Ardee to Dundalk, "during the period in said presentment;" that the applicant Roe was the contractor for the work; that it had been proved to the satisfaction of the Justice that the materials, etc., required for the repair of the road "for the period in said presentment" could not conveniently be procured elsewhere than in a field in Townpark, Ardee, "in the occupation of Patrick Keelan"; and, after negativing the statutory exceptions, proceeded to authorize Roe and his assistants, "so long as he shall be the contractor as aforesaid,

(1) Before JOHNSON, MURPHY, and GIBSON, JJ.

during the period in the said presentment mentioned, to enter as such contractor" upon said field for the purpose of taking and carrying away the materials wanted for the repair of the road. Notice of the application had been given to Keelan, who was in occupation of the field under a grazing letting for eleven months from the guardian (Mr. D. Guinness) of the owner who was a minor, but no notice had been given to any one else. Mr. Guinness applied for and obtained a conditional order, dated the 3rd November, 1897, to quash the order of the Justice, on the special grounds that the order did not sufficiently specify and limit the time within which it was to have operation, and that it was not founded upon any notice to any person interested in the ownership of the lands either as landlord, tenant, or occupier thereof, within the meaning of the statute. Roe filed an affidavit, as cause, stating that the field was a barren hill; that the minor's father had opened it as a quarry, or gravel pit, and that the taking of road materials from it could cause little or no damage; that after the order had been obtained he had had a correspondence with Mr. Guinness' solicitors, and on the 27th September had had a meeting with an agent of Mr. Guinness, with whom he had a discussion as to the spot from which the materials were to be taken, as to the amount of compensation to be paid, and as to putting up the necessary fences around the spot; that as no steps had been taken to upset the order, and as under his contract the materials had to be put upon the road before the 1st October, he had entered on the field and taken away some twenty loads of gravel. The present applicant's affidavit, on which he had obtained the conditional order, had merely stated that no steps had been taken under the order until the 12th August, 1897, when Roe had attempted to enter on the field, but was stopped by the local agent of the estate, whereupon Roe desisted, but that Roe's solicitor had since written to Mr. Guinness' solicitors stating that they would advise their client to enter on the land notwithstanding the resistance offered, and that Roe had so entered.

A. F. Blood, for the applicant.

A. Dickie, for the respondent Justice.

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[Counsel referred to *Reg.* (*Bentham*) v. *Justices of Dublin* (1); *Reg.* (*Murphy*) v. *Justices of Wexford* (2); *Fitz Patrick* v. *Pine* (3); *Reg.* (*Fitz Gerald*) v. *Justices of Limerick* (4); *Earl Manvers* v. *Bartholomew* (5); *Clarke* v. *Clarke* (6); *Re M'Mahon* (7)].

GIBSON, J.:—

In my opinion an order cannot be legally made under section 162 of the Grand Jury Act, without some notice being given, at least to the occupier of the lands on which the contractor wishes to enter, of the intended application to the Justices. In the present case notice was given to the grazing tenant, who must, I think, be considered as occupier, and therefore this objection to the order fails.

As to the other ground of objection—without expressing any opinion as to the decision in *Reg.* (*Bentham*) v. *Justices of Dublin* (1)—I am of opinion that that case rules the present, and that, if the point is to be reconsidered, it must be considered not in this Court, but in the Court of Appeal. I think that the meaning of that case is that a person affected by such an order of Justices is entitled to find, upon the face of the order, the limit of time during which the authority is to continue, and is not to be compelled to investigate documents outside that order at his own expense. In *Bentham's Case* (1) the contract was referred to in the order, and that contract, being made under the Grand Jury Act, must have contained some limit of time; and the order, in that way, might be said by reference to have been limited and definite in its duration; but the Court was nevertheless of opinion that, although the contract, if examined, would have afforded information as to the limit of time, still the order of the Justices was bad, inasmuch as it did not state this upon its face. It seems to me that this was the view adopted by the Court in *Reg.* (*Murphy*) v. *Justices of Wexford* (2); and I fail to see any distinction between a Grand Jury contract and a Grand Jury presentment.

(1) 14 L. R. Ir. 443.
(2) [1894] 2 Ir. R. 81.
(3) 13 Ir. C. L. R. 32.
(4) 27 Ir. L. T. R. 35.
(5) 4 Q. B. D. 5.
(6) [1895] 2 Ir. R. 451.
(7) 2 Cr. & Dix, 418.

I am, therefore, of opinion, notwithstanding the view taken by Mr. Justice Murphy, for whose opinion I have the greatest respect, that this objection to the order must be allowed, and the conditional order for *certiorari* made absolute.

MURPHY, J.:—

I do not think that any Judge could have any hesitation in overruling the second objection made in this case, as to the sufficiency of the notice. The notice was here given to the person who was in the occupation of the lands under a grazing letting, who was clearly the occupier of the lands when the notice of the application was served on him.

As to the first and more important question, however, upon which I give my judgment with considerable doubt, inasmuch as it is stated to be inconsistent with the decision in *Reg.* (*Bentham*) v. *The Justices of Dublin* (1), and as my brethren take a different view—I am strongly opposed to objections being allowed to orders of Justices, unless there has been, or may be, some substantial injustice or wrong done under them from defect in their form. If a statute prescribes a particular form which an order must follow, well and good; the Justices must adhere to it; but here no particular form is prescribed; and it would be, in my opinion, a great hardship to hold, where there was merely an unsubstantial error in such an order, that a person, who had a right to apply for and get the order, and who acted honestly under the power it gave to him, should be exposed to an action of trespass in consequence of his having acted upon the order which the Justices had full power to make. Now I do not suppose that the Justice, in making the order in this case, had his attention directed to *Bentham's Case* (1), so as to model the form of the order upon that decision. There is no doubt that he thought he was complying substantially with the provisions of the Act of Parliament; and it cannot be denied, and it was not suggested at the bar, that the terms of the Act were not strictly adhered to in the order that was made. [His Lordship, having referred to the provisions of section 162, continued]. The effect of the section is that the contractor

(1) 14 L. R. Ir. 443.

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must get an order from a Justice or Justices in the first instance; and he must prove, when applying for that order, that he is a "contractor for" some "work to be executed by Grand Jury presentment"; he must prove that the lands are not a deer-park or so forth; and he must prove to the satisfaction of the Justice that the gravel, stones, or other material sought, cannot be conveniently procured elsewhere. That is all. The Justices, under this section, have power to make an order authorising the entry on lands for the purpose of making or cleansing drains; and I do not know whether the rule as to fixing a definite time would apply to an order of that sort. But the matters that I have stated are all that the statute requires to be proved to entitle the contractor to the order. The present respondent, a contractor for the repair of a road under a Grand Jury presentment, comes before the Justice, and proves the matters that the section requires him to prove; he had given notice of his application to the person in occupation of the lands; and the Justice, being satisfied as to the facts, makes an order which this Court is now called upon to quash by *certiorari*. To correct what? Certainly not anything in the way of error or omission of what section 162 requires. The section does not say anything as to fixing the length of time in the order; but, in any event, the order in the present case, in my opinion, does sufficiently define the time during which it is to operate. It recites that Roe was the contractor for certain work under a presentment of the Grand Jury of the county for the repair of a road "during the period in said presentment," and authorises him, "so long as he shall be the contractor as aforesaid, during the period in said presentment mentioned, to enter as such contractor" upon the field and take material therefrom. This, in my judgment, unquestionably fixes a definite limit of time—a definite time ascertained and fixed by a presentment that is to be found among the public records of the county, made by the Grand Jury under the statute mentioned in the order. It has been stated to us that this public record was before the Justice when he was making the order, as it should be, and that in the presentment it was provided that the contractor should keep the road in repair until the Summer Assizes, 1902. The only difficulty that can be suggested is that the owner might be put to the trouble of

going to the Court-house and examining the presentment there. But, in this case at least, there could be no need of this; the length of these contracts was perfectly well known, and the owner's agent was himself upon the Grand Jury when this presentment was passed, and could at any time get a copy in the office for the asking. The order of the Justice must show the authority under which he is acting; this has been done; it must show that the requirements of the statute have been complied with; this had been shown; the order, in my opinion, is a perfectly valid order; and this Court can only tend to cause great mischief if it seeks to introduce a particularity into magistrates' orders which the statutes do not require, or if it exhibits a readiness to set such orders aside for want of form, where there is a substantial compliance with the form the statute directs, and where clear justice has been done. The order is on the face of it a valid order made under the authority of a statute. I cannot consent to set an order so made aside unless it is clearly shown that an injustice may be committed under it from defect in its form or terms.

JOHNSON, J.:—

I agree with Mr. Justice Gibson. The sole question before the Court is not whether the magistrate has substantially complied with the Act of Parliament, but whether the order made by him is good upon its face. It has been decided over and over again in this Court, ever since *Fitz Patrick* v. *Pine* (1), that such an order, unless it shows jurisdiction on its face, is invalid, and cannot justify any acts purporting to be done under its authority. The decisions of this Court have also established that the order must be for a definite time. We are bound by those decisions, and the question is therefore reduced to the narrow point whether or not this case is within the principle of the decision in *Reg.* (*Bentham*) v. *Justices of Dublin* (2). That case settles the principle, if it can be called a principle, that, in such an order as the present, a definite limit of time must be fixed during which the order is to operate. Such an order is against common right, and the person

(1) 13 Ir. C. L. R. 32. (2) 14 L. R. Ir. 443.

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who obtains, and is seeking to act under it must be able to show that such common right is lawfully invaded. I therefore cannot agree in the view that the person whose rights are thus affected can be sent elsewhere to find out whether the definite limit of time, which properly should appear on the face of the order, can be discovered in some other place, in some other document, and be incorporated in the order by reference. A person who comes to interfere with another's right of property must be able to hand to that other, if he requires it, a document which shows on its face everything that the statute authorising such interference expresses or implies. The present case seems to me, on its facts, to fall within *Bentham's Case* (1), where, equally as in the present instance, an actual and legal right was invaded.

For these reasons I concur in the judgment of Mr. Justice Gibson. All the members of the Court agree as to the sufficiency of the notice that was given.

Solicitors for applicant: *Sutton & Sutton.*
Solicitor for respondent: *Dickie.*

A. E. R. J.

(1) 14 L. R. Ir. 443.

O'CONNELL *v.* THE GUARDIANS OF THE POOR OF THE MIDLETON UNION (1).

Q. B. Div. 1898.

Jan. 18, 24.

Public Health (Ireland) Act, 1878 (41 & 42 *Vict. c.* 52), *ss.* 11, 258—*Sanitary authority—Remuneration of medical officer—Attendance at sanitary prosecutions.*

The medical officer of health of a dispensary district is entitled under the Public Health (Ireland), 1878, to remuneration from the sanitary authority for attending at a prosecution instituted by it at a rate fixed by the Local Government Board, "unless it has been agreed that the duty of affording such attendance shall be included in his salary." But where a resolution was passed by the sanitary authority fixing the salaries of medical officers of health at certain sums, to include the duty of attending at sanitary prosecutions, and a person was afterwards appointed medical officer of health by the committee of management of a dispensary district, and subsequently attended at a prosecution at the request of the sanitary authority, it was *held* that the medical officer was bound by the resolution of the sanitary authority, and not entitled to the remuneration fixed by the Local Government Board pursuant to the statute, although he had no notice of the resolution at the time of his appointment or afterwards.

CASE STATED as follows by the Right Hon. Mr. Justice Murphy on the hearing of a civil bill appeal at the Summer Assizes for the county of Cork, East Riding, 1897.

1. The plaintiff is a doctor of medicine, and the defendants are the Rural Sanitary Authority in and for the Midleton Poor Law Union. The Castlemartyr Dispensary District is a district of the said union.

2. On the passing of the Public Health (Ireland) Act, 1878, each medical officer of a dispensary district became by virtue of sect. 11 a sanitary officer for such district under the title of medical officer of health. Acting under the provisions of that section the defendants by resolution, dated the 13th September, 1879, fixed the salaries of the various medical officers of health in their union, and amongst others that of the medical officer of health for the

(1) Before MADDEN, BOYD, and KENNY, JJ.

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Castlemartyr Dispensary District. The terms of the said resolution were as follows:—

"Resolved, that the following sums be fixed as the salaries of the respective medical officers of health of the districts mentioned below, such salaries to include the duty of affording attendance and assistance in any prosecution instituted by the sanitary authority when they are required so to do:—Aghada, £25; Castlemartyr, £25; Cloyne, £25; Midleton (No. 1), £25; Midleton (No. 2), £25, and Walshtownmore, £25, to commence from this date."

The Local Government duly approved of the salaries so fixed.

3. On June the 14th, 1888, the office of medical officer of the Castlemartyr Dispensary District of the said union having become vacant, the committee of management of the said district, pursuant to the regulations in that behalf made and provided, resolved to proceed to appoint a medical officer for the said district, and on June 19th, 1888, caused an advertisement to be inserted in the public papers in the words and figures following:—

MIDLETON UNION—CASTLEMARTYR DISPENSARY DISTRICT.

MEDICAL OFFICER WANTED.

The Committee of Management of the above District will, at their meeting to be held at the Dispensary, Castlemartyr, on Friday, the 29th day of June, 1888, at 12 o'clock noon, proceed to elect a Medical Officer, in accordance with the regulations prescribed by the Local Government Board, at a salary of £100 per annum, and £25 as Medical Officer of Health, together with Registration and Vaccination Fees. Applications, accompanied with diplomas and testimonials, will be received by me up to 12 o'clock noon on the above day.

By order of the Committee of Management.

R. C. BOLSTER, M.A., Clk., *Hon. Sec.*

The Rectory, Killamucky, Castlemartyr,
14*th June*, 1888.

4. The plaintiff in reply to the said advertisement sent in an application to the said committee, and at a meeting of the said committee, held on June 29th, 1888, the plaintiff was duly appointed such medical officer.

5. On July 6th, 1888, the said appointment was duly confirmed by letter of the Local Government Board of Ireland of that date.

6. On May 16th, 1896, the plaintiff, as medical officer of health, was requested by the defendants to attend at Castlemartyr Petty Sessions on May 19th, 1896, to give evidence in a prosecution instituted by the defendants as such sanitary authority against one James Walsh.

7. The plaintiff attended at the said Petty Sessions on the said day, and gave evidence at the hearing of the said prosecution.

8. The plaintiff thereupon claimed from the defendants as such sanitary authority the sum of £1 1*s.*, being the minimum remuneration for such attendance fixed by the order of the Local Government Board, dated 11th November, 1878, made pursuant to section 258 of the Public Health (Ireland) Act, 1878. (1)

9. On April the 2nd, 1897, the plaintiff brought a civil bill in the County Court of Cork (East Riding), division of Midleton, against the defendants as such sanitary authority, to recover the said sum of £1 1*s.*, and the said civil bill came on to be heard before the Recorder of Cork at Midleton, on 23rd June, 1897, and the civil bill was dismissed.

10. The plaintiff appealed from the said dismiss, and the said appeal came on for hearing before me at Cork on July 17th, 1897.

11. The plaintiff was examined in support of the said appeal, and proved the facts above stated, save those in paragraph 2, which were admitted: and that he had no notice or knowledge of the said resolution of September 13th, 1879, until in reply to an application to the defendants for payment of the said sum of £1 1*s.*, he received a letter of 16th June, 1896, from the Clerk of the Union, communicating the said resolution to him; and that no agreement had been made between him and the defendants, or between him and the said committee, that the duty of affording attendance at any prosecution instituted by the defendants as such sanitary authority should be included in his salary, except as far

(1) See Mooney's Irish Poor Law, pp. 999, 1000.

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as the existence of said resolution, and his application for, and acceptance of, office amounted to such an agreement.

12. It was contended on behalf of the plaintiff that, in the absence of any such agreement, except as aforesaid, between the plaintiff and the defendants, or between the plaintiff and the committee, the plaintiff was entitled to be paid the sum of £1 1*s.* by the defendants as such sanitary authority pursuant to section 258 of the said Act, and the said order made thereunder, and that the said resolution of September 13th, 1879, not having been communicated to the plaintiff, was not binding upon him, and that the existence of the said resolution, and his application for, and acceptance of, office did not amount to an agreement within the meaning of the said section of the said Act.

13. It was contended on behalf of the defendants that on the facts stated they were not liable.

14. I was of opinion that the contention of the defendants was correct, and I affirmed the said dismiss, but at the request of counsel for the plaintiff I have stated this case for the opinion of the Court.

The question for the opinion of the Court is, whether I was right in so holding? If I was right in so holding, I am to affirm the said dismiss of the Recorder of Cork with costs to be fixed by me, and if I was wrong in so holding, I am to reverse the said dismiss, and give a decree for a guinea with costs to be similarly fixed.

William Lawson, for the plaintiff:—

In the absence of agreement to the contrary, the plaintiff is entitled to the remuneration claimed: *Roulston* v. *Guardians of the Strabane Union* (1), which was a decision on the question of remuneration. The words of section 258 of the Public Health Act, 1878, "unless it shall have been agreed," must mean unless it shall have been agreed between the medical officer of health and the sanitary authority, or between him and some persons acting on their behalf. There is no evidence of any such agreement. The plaintiff cannot be bound by the terms of the resolution of the

(1) 22 L. R. Ir. 22, 157.

guardians, as he had no notice of it. He was appointed medical officer of the district by the dispensary committee, pursuant to the Medical Charities Act, 1851 (14 & 15 Vict. c. 68), and the regulations made thereunder, and by sect. 11 of the Public Health Act, 1878, he became medical officer of health with an additional salary. The advertisement set out in the case was issued in the ordinary way by the committee pursuant to Article 18 of the Dispensary Regulations, see Mooney's Compendium, p. 460. It contained no reference to the resolution, nor any statement that the salary of £25 was to cover attendance at sanitary prosecutions. The words of the advertisement, "in accordance with the regulations prescribed by the Local Government Board," refer to the printed regulations prescribed by the Local Government above referred to, and cannot refer to the resolution of the guardians. The Local Government Board had to approve of the resolution fixing the salary, but that did not make it a regulation of the Local Government Board. The rider attached to the resolution could have no effect unless it was communicated to the medical officer of health at the time. The letter of the Local Government Board mentioned in the case contained no reference to the resolution, although it enclosed a copy of the Public Health Act, 1878, and of the regulations already referred to, and of the sanitary order applicable to the district, which prescribes the duties of the medical officer of health: see Mooney's Compendium, pp. 455–465, 952–959. The committee of management is composed of guardians, and is the body authorised by statute to make the appointment, subject to the approval of the Local Government Board; the salary is fixed by the sanitary authority, with the like approval, and the duties are prescribed by the Local Government Board. The sanitary authority is bound to pay the remuneration fixed by the Local Government Board for attending at a prosecution, which was recovered as part of the costs of the prosecution, unless it can show an agreement by the medical officer of health with it that such attendance was to be included in his salary. [He also referred to *M'Carthy* v. *South Dublin Union* (1); *Rogers* v. *The Youghal Union* (2); *Athy Guardians* v. *Murphy* (3).]

(1) Ir. R. 2 C. L. 97. (2) 16 L. R. Ir. 79, 94. (3) [1896] 1 Ir. R. 65.

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T. M. Healy, for the defendants:—

The committee are a separate body, and have only a limited authority. The salary of the plaintiff was fixed by the resolution of the guardians, and he is bound by the terms of that resolution, on which he must rely. He should have inquired as to his duties and remuneration when he was appointed. The guardians have no power to make the payment, having regard to their resolution which was approved by the Local Government Board.

Jan. 24.

MADDEN, J.:—

The plaintiff is medical officer of health of the Midleton Union, of which the defendants are the sanitary authority. It is the duty of the plaintiff as such officer to attend and assist in any prosecution instituted by the sanitary authority. The 258th section of the Public Health Act of 1878, which imposes this obligation upon him, enacts that "he shall be entitled to remuneration from the sanitary authority at such rate as the Local Government Board shall approve, unless it shall have been agreed that the duty of affording such attendance and assistance shall be included in his salary, or that his whole time shall be occupied in the discharge of the duties of his office." The rate of remuneration is fixed by an order of the Local Government Board, dated the 11th of November, 1878, at the amount for which the plaintiff sues, and the question reserved for the Court is as to his right to recover this amount.

The plaintiff was appointed medical officer by the committee of management of the Castlemartyr Dispensary District of the Midleton Union on the 29th of June, 1888. The constitution, powers, and duties of the managing committee are defined by the Medical Charities Act, the 8th section of which provides that the "committee of management shall appoint, from time to time, subject to the approval of the said Commissioners, one or more medical officers for the said district, with such qualifications as the said Commissioners shall determine, and with such salaries as the guardians, subject to the approval of the said Commissioners, shall determine." The committee are thus constituted by statute the agents of the guardians, with a limited authority. They can

appoint a medical officer, but only at a salary fixed by the guardians, with the approval of the Poor Law Commissioners, now and in 1888 represented by the Local Government Board.

It appears that the salaries of the various medical officers of health in the Midleton Union were fixed by resolution of the 13th of September, 1879, approved by the Local Government Board. The salary of the medical officer of health for the Castlemartyr District was fixed at £25, and the resolution provided, in regard to all the salaries, that they were "to include the duty of affording attendance and assistance in any prosecution instituted by the sanitary authority, when they are required so to do."

The office of medical officer of the Castlemartyr District having become vacant, the managing committee published an advertisement, to which the plaintiff replied, and upon the terms of which he was appointed. The advertisement stated that the committee would, upon the 29th of June, 1888, "proceed to elect a medical officer in accordance with the regulations prescribed by the Local Government Board, at a salary of £100 per annum, and £25 as medical officer of health, together with registration and vaccination fees."

The plaintiff contends that notwithstanding the terms of this advertisement, he was elected to, and holds, the office on different terms as regards remuneration and salary from those prescribed by the Local Government Board. In my opinion the committee of management would have acted *ultra vires* if they had purported to make any such appointment, and their action would have been a nullity. The power and authority of the committee are limited by statute in the manner which I have pointed out. The plaintiff does not claim under a special agreement with the defendants. He relies on his statutory right to remuneration as medical officer of health. He is in this dilemma—If his appointment gave him the right to the fees claimed it was *ultra vires*. If, on the other hand, it was such an appointment as the managing committee were authorised to make, it was upon the terms prescribed by the defendants, with the sanction of the Local Government Board, and he is precluded by agreement from claiming extra remuneration.

The latter is, in my opinion, the true view of the case. The advertisement published by the managing committee informed

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applicants that the appointment would be made "in accordance with the regulations prescribed by the Local Government Board." These words are quite large enough to include regulations with regard to remuneration. The advertisement does not state particulars, nor was it necessary that it should. The plaintiff could have ascertained the prescribed regulations as regards both duties and remuneration. He is, in my opinion, bound by the resolution of 13th September, 1879, under which he has received his salary since the year 1888. Having accepted office upon the terms of this resolution, he has, in my opinion, become party to an agreement excluding his right to remuneration beyond the amount of his salary, within the meaning of the 258th section of the Public Health Act, 1878. For these reasons I think that the decision of the Recorder of Cork, affirmed by Mr. Justice Murphy, was right, and that the question reserved for our decision should be answered accordingly.

BOYD, J.:—

I entirely agree with the judgment pronounced by Mr. Justice Madden. By the 5th section of the Public Health (Ireland) Act, 1878, every urban sanitary authority is authorised to appoint as a committee "out of their own number so many persons as they may think fit for any purposes of this Act which, in the opinion of such authority, would be better regulated and managed by means of a committee or committees: Provided that a committee so appointed shall in no case be authorised to borrow any money, to make any rate, or to enter into any contract, and shall be subject to any regulations which may be imposed by the authority that formed it." Section 9 provides that rural sanitary authorities shall within their district have the same powers as are by the Act conferred on urban authorities.

By the 11th section it is provided that "every medical officer of a dispensary district shall be a sanitary officer for such district, or for such part thereof as he shall personally be in charge of, under the title of medical officer of health, with such additional salary as the sanitary authority thereof may determine with the approval of the Local Government Board; and every sanitary

authority, whether urban or rural, shall appoint such other sanitary officers, including a medical superintendent officer of health when deemed necessary, as the Local Government Board shall in each case direct, with such salaries or additional salaries as the said sanitary authority shall determine, with the approval of the Local Government Board"; and then follows a provision for the assignment to such officers of their districts. Then comes the 258th section which is as follows:—"Every officer of a sanitary authority shall attend and assist in any prosecution instituted by such authority on receipt of an order from such authority so to attend: provided always, that if a medical officer of the sanitary authority shall so attend and assist, he shall be entitled to remuneration from the sanitary authority at such rate as the Local Government Board shall approve, unless it shall have been agreed that the duty of affording such attendance and assistance shall be included in his salary, or that his whole time shall be occupied in the discharge of the duties of his office; and such payment shall be deemed to be expenses incurred by the sanitary authority under this Act, and may be recovered as part of the costs of the prosecution." By a resolution of the sanitary authority, dated 13th September, 1879, and duly approved of by the Local Government Board, it was resolved that the salary of persons appointed to the office to which the plaintiff was subsequently appointed should be a fixed sum, and that same should include the fee which the plaintiff seeks to recover in this case. The plaintiff was appointed by the committee in June, 1888. The plaintiff's contention is that he was not informed of that resolution, and was in ignorance of the existence of it till last year when he claimed his remuneration, which is the subject of the present action. His appointment was confirmed and approved of by the Local Government Board, who, by their letter of 6th July, 1888, informed him of his appointment, and referred to the Acts and regulations under which his appointment was to be held; and also sent him copies of those documents. He received those documents, but he does not appear to have made any inquiry as to the special terms of the said resolution. The duty was then cast on him to inquire as to the nature of those special terms, and if he did not do so he cannot afterwards seek to repudiate those

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terms, and must be taken to have accepted the office on the terms mentioned in the said resolution. The committee had no power to enter into any contract, or to override the terms of the said resolution; and if they did so their action would be *ultra vires*, and could not bind the defendants. On this ground also the case of the plaintiff fails, and the action should be dismissed.

KENNY, J.:—

As I read the case stated by Mr. Justice Murphy, the only question that was argued before him, was whether the plaintiff on the facts stated had expressly agreed, or should be deemed to have agreed, that the duty of attending and assisting in prosecutions instituted by the sanitary authority should be included in his salary. All the facts necessary for the decision of that question are stated, and no other point is specially mentioned as having been raised. The substantial question, however, that has been argued before us, is of a somewhat different character, namely, whether the defendants as the sanitary authority can be made liable for a fee which they, being the salary-fixing authority, had, with the concurrence of the Local Government Board, resolved should be covered by the salary of the plaintiff as medical officer of health. The case is stated in such wide terms as, in my opinion, to leave this question open for decision; and having come to a distinct conclusion on it adverse to the plaintiff, it is unnecessary for me to decide whether the plaintiff expressly or inferentially "agreed" within the meaning of section 258 of the Irish Public Health Act, 1878, to an inclusive salary.

In the appointment of medical officers the sanitary authority (who are the guardians), and the committee of management have separate functions. By the Medical Charities Act of 1851, the committee are to appoint the medical officers, subject to the approval of the Local Government Board, and with such salaries as the *guardians* shall determine. The 11th section of the Irish Public Health Act of 1878 constitutes the medical officer a medical officer of health with such additional salary as the sanitary authority shall determine, and the 258th section empowered him to charge a fee for attending in prosecutions by the sanitary

authority unless it should have been agreed that such fee was to be included in his salary. Thus, while the committee were to have the right of selecting the individual, they had absolutely no power of fixing or altering his remuneration. To the guardians alone, with the assent of the Local Government Board, that power was entrusted, and any attempt on the part of the committee to arrogate that authority to themselves would, in my opinion, be *ultra vires*. It follows as a natural consequence that no matter what contract in respect of the salary of the medical officer of health might be entered into by the committee, the guardians could not be made liable for a larger amount or for a different character of remuneration than had been fixed by them with the approval of the Local Government Board. In this case the guardians, by their resolution of the 13th September, 1879, confirmed by the Local Government Board, had fixed the extra salary of the medical officer of health of the Castlemartyr District at £25 a-year, such salary to cover the duty in respect of which the plaintiff now claims the fee for which the civil bill has been brought, and no liability beyond that annual amount can be imposed on them so long as that resolution continues in force. I therefore think that the dismiss should be affirmed.

Solicitor for the plaintiff: *W. G. Lane.*
Solicitor for the defendant: *Maurice Healy.*

J. P. B.

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REG. (O'LEARY) *v.* CALVERT (1).

Jan. 13, 14.

Sanitary authority—"Illegal payment"—Local Government Board auditor—Surcharge—"Person making or authorising the making of" an "illegal payment"—Local Government (Ireland) Act, 1871 (34 & 35 *Vict. c.* 109), *s.* 12—*Labourers (Ireland) Acts*, 1883 *to* 1886.

The Guardians of the Poor of the Skibbereen Union, as Sanitary Authority of their district, entered into a contract for the repair of certain labourers' cottages, their property, these repairs to be completed within a certain time to the satisfaction of their engineer. Owing to the contractor's default, the work was not completed within the time limited; and, several months after the period for completion had expired, the engineer gave to the contractor a certificate declaring him entitled to a certain sum on account of work done under the contract, and this amount was paid by the Guardians. The respondent, an auditor under the Irish Local Government Board, when auditing the Guardians' accounts, surcharged this amount, which he deemed to be an illegal payment, against the Guardians' engineer, as being "the person authorising the making of the illegal payment":—

Held (by Sir P. O'Brien, L.C.J., and Gibson, J.; *diss.* Murphy, J.), that, assuming the payment to have been an illegal one, the engineer could not be treated as "the person authorising the making of the illegal payment" within section 12 of the Local Government (Ireland) Act, 1871, and that the surcharge should be quashed.

CERTIORARI.

This was a motion to make absolute a conditional order to quash a surcharge made by the defendant, an auditor acting under the Local Government Board for Ireland, when auditing the accounts of the Guardians of the Skibbereen Union for the half-year ending 29th September, 1896.

On the 1st December, 1894, Cornelius Hegarty entered into a contract with the guardians of the poor of the union [as the sanitary authority of the district] to put certain labourers' cottages in good habitable order, repair, and condition, under the superintendence and to the satisfaction of Florence O'Leary, the

(1) Before SIR PETER O'BRIEN, L.C.J., and MURPHY and GIBSON, JJ.

engineer to said guardians, and to have the same completed within such time as the said F. O'Leary should specify either verbally or in writing, and further to keep the said several cottages and each of them in good habitable order, repair, and condition, for a period of twelve months from the date thereof, for the sum of £1 9*s.* per cottage. The cottages were not put in repair within twelve months; and it may be assumed for the purposes of this report, though the fact was in controversy between the parties, that there was a substantial breach of contract in this respect by the contractor. Subsequently to the 1st of December, 1895, the contractor executed nearly the entire balance of the work, and, on the 7th May, 1896, O'Leary issued to him a certificate stating that he was entitled to 10*s.* per cottage on account, in respect of fifty cottages. In pursuance of this certificate a cheque was drawn, on the 9th May, 1896, by the guardians in favour of Hegarty for £25. The auditor who, prior to the 1st December, 1895, had pointed out that the work was not being completed in accordance with the contract, surcharged this amount against O'Leary, as the person "on whose certificate the payment was made." In his report and surcharge the auditor stated that in his opinion the contract between Hegarty and the Board of Guardians had not been carried out in accordance with the terms thereof, and that O'Leary's certificate showed that this was so. O'Leary now sought to have this surcharge quashed on *certiorari*, on the ground that the surcharge was without and in excess of jurisdiction, and was improperly and erroneously made.

T. M. Healy, for the applicant.

Seymour Bushe, Q.C., and *Sheehan*, for the defendant.

Cur adv. vult.

GIBSON, J. :—

Jan. 14

On the 1st December, 1894, Hegarty entered into a written contract with the Skibbereen Guardians, secured by bond of himself and two sureties, that he would put and keep in repair, for twelve months, the labourers' cottages in seven electoral

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divisions in the county at £1 9s. each, to the satisfaction of O'Leary, the engineer to the guardians. The number of such cottages was 53. Owing to the contractor's default the repairs of several of the cottages were not completed within the twelve months, but the contractor afterwards, without any new contract or bond, executed nearly the entire balance of the work. On the 7th May, 1896, O'Leary gave him a certificate, stating that he was entitled to 10s. per cottage in respect of 50 cottages, and in pursuance of this certificate a cheque was drawn in Hegarty's favour for £25 at a meeting of the Board of Guardians, on the 13th March, 1897. The auditor, Mr. Calvert, deeming this payment illegal, surcharged it against O'Leary, whom he held to be the person authorising the payment within the meaning of the Local Government (Ireland) Act, 1871, section 12.

Two questions were discussed before us: First, Was O'Leary a person who, within the statute, authorised the illegal payment? Secondly, Was the payment illegal?

Under the Poor Law Acts the auditor plainly would have no power to surcharge a person occupying the position of the engineer in this case. The Local Government (Ireland) Act, applying to Sanitary Authorities, and governing, as counsel agree, this case, contains wider language and directs the surcharge to be made upon the person making or authorising the making of the illegal payment.

Under the contract, the only power of the engineer was to certify as to the completion of the work to his satisfaction. He could not order payment. At the time the certificate was given, the contract had been broken, as the guardians knew. Whether broken or not, it was the guardians who were paymasters and who alone could authorise payment. The certificate satisfied the condition in the contract, but the authority to pay resided in the guardians alone. If the certificate was given illegally or in breach of duty, the guardians might disregard it, or if damnified, proceed against the engineer for damages. In my opinion, the only persons who can be surcharged are those making the illegal payment, or those directly authorising the payment out of the union funds over which they have control. The inconvenience of making a distinction between the class of persons liable to sur-

charge in Poor Law cases and those liable in sanitary cases is obvious. It is the custodian or controller of the money, by whose immediate act the payment has been illegally made or authorised, who alone is subject to the auditor's jurisdiction. The surcharge against such a servant as an engineer, is entirely novel and without precedent.

The second topic was only faintly pressed. The contract was plainly entire, and time was of its essence, as the repairs of each year must be kept distinct. The auditor therefore was *prima facie* right in holding the payment illegal, unless it could be argued that, by allowing the contractor to complete as if the contract was not broken, the guardians, without any written variation of the contract, must be deemed to have waived the breach, or to have accepted liability to pay on a *quantum meruit*. No such point was before the auditor, and it is not now necessary to decide it, as the surcharge is disallowed on other grounds. The guardians, however, must not suppose that, because the wrong person has here been surcharged, they can with impunity make payments in respect of the contract which the auditor deems to be illegal by reason of the contractor's failure to perform—a view which I am far from saying may not be right.

MURPHY, J. :—

I take a different view from Mr. Justice Gibson. It is admitted that the payment was an illegal one; and the sole question is, whether the auditor was right in surcharging the amount upon the engineer of the guardians, as the person making or authorising the payment of the illegal demand. The engineer was elected by the guardians, and was placed, with his own knowledge and consent, between them and their contractors, to certify as to the payments to be made and as to the work done. He knew that this was his duty; he had the contract before him, and knew that the work should be completed within a year, and that it was not completed within the year. In March, 1895, when auditing the accounts of the guardians, the auditor, in his report, had called the attention of the guardians to the fact that, though three months had elapsed from the date of the contract, the contractor had as yet done nothing. The engineer, O'Leary, must have been aware of this. The contract was made in December, 1894; in December,

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1895, the works had not been completed, and we do not even know what work had been then done; another six months passed, and the works were still incomplete. Meanwhile, on the 7th May, 1896, long after the period for the completion of the contract had expired, the engineer, whose duty it was to protect the guardians and the rate-payers, gives a certificate that the contractor is entitled to an instalment of £25. The guardians acted on this certificate, and paid out, illegally, the sum of £25 to the contractor. O'Leary was, I think, the author of that illegal payment; if he was not the person who made it, he was at least the person who authorised its making; and he, therefore, in my view, was rightly surcharged this amount by the auditor.

SIR P. O'BRIEN, L.C.J. :—

I take the same view as my brother Gibson. The question is whether, upon the construction of the Local Government Act, this engineer authorised the payment of the cheque within the meaning of the section. I should have entertained no doubt that he did not come within the section, but for my brother Murphy's dissent. It is true that he gave a certificate, which was a condition precedent to the payment of the contractor; but, in my judgment, this certificate was not at all an authorisation or an authority to pay within the meaning of the 12th section of the Act of 1871.

Solicitor for the applicant: *P. O'Leary.*
Solicitors for the respondent: *J. C. & A. Blake.*

A. E. R. J.

W. BURRELL & CO. *v.* P. J. TUOHY, SECRETARY TO THE COMMISSIONERS OF KINGSTOWN HARBOUR, CONTINUED IN THE NAME OF H. WILLIAMS, SECRETARY TO THE SAID COMMISSIONERS (1).

Q. B. Div. 1898. Jan. 15, 17, 19. Feb. 4.

Harbour Commissioners—Negligence—Harbour of refuge—Buoy—Defective welding of ring—Omission of adequate test.

A ship parted from her moorings in Kingstown Harbour during a strong gale, and sustained damage. In the opinion of the Judge who tried the case without a jury and of the Divisional Court the cause of the accident was that the ring to which the ship's cable was attached was defectively welded to the buoy, and broke off without any contributory negligence by the plaintiffs (the shipowners). The buoy had been in use a short time only. It had been purchased by the Harbour Commissioners from a first-class manufacturer, and the defect in the welding could not have been discovered by inspection, or by the ordinary test of hammering. It is not the practice of manufacturers to submit such rings to any test (though flaws are possible in the best workmanship) unless required to do so by the specification. But if so required (which is frequently but not universally done) they are tested by a public department in a well-known and recognised manner, analogous to the testing of cable chains. This precaution had not been taken by the Harbour Commissioners:—

Held, that the omission to apply such a test was actionable negligence on the part of the Commissioners, rendering them responsible for the result of the accident.

NEW TRIAL MOTION.

The action was brought against the defendant (Secretary of the Board of Public Works in Ireland), as Secretary of the Kingstown Harbour Commissioners, to recover damages for injuries sustained by the plaintiffs' vessel while moored in Kingstown Harbour. The action was tried in the Trinity Sittings, 1897, by Lord Justice Holmes, without a jury; and His Lordship found in favour of the plaintiffs, and assessed the damages at £1870; and entered judgment for them accordingly.

(1) Before ANDREWS, MADDEN, BOYD, and KENNY, JJ.

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The material facts, as well as the questions argued, are sufficiently stated in the judgments of Lord Justice Holmes (at Nisi Prius (1)) and of the Divisional Court.

Ronan, Q.C., Henry, Q.C., and *Blood*, for the plaintiffs.

Campbell, Q.C., Wright, Q.C., and *Conner*, for the defendants.

Cur. adv. vult.

ANDREWS, J.:—

This was an action for damages for injuries sustained in October, 1896, by a ship of the plaintiffs of 1449 tons register, and which injuries were occasioned, as they alleged, by negligence on the part of the defendants, who are the harbour authority of Kingstown Harbour, and have the control of that harbour and the mooring buoys therein. In October, 1896, the plaintiffs' ship

(1) The following is the judgment delivered at the trial by Lord Justice Holmes:—

As this case is one of considerable importance, I thought it right to consider the evidence carefully, and to put my views in writing so as to allow either party hereafter to review my decision if necessary.

The master and mate of the vessel, who were on deck at the time the accident occurred, and whose evidence is only met by the somewhat unintelligible speculations of the defendants' engineer, have I think established that the part of the mooring tackle that first gave way was the ring of the buoy. I hold therefore that the cause of the injuries to the plaintiffs' ship, was the breaking of this ring, leading, as a natural consequence, to the fracture of the key of the windlass, and the drifting of the vessel. Under these circumstances the only question appears to me to be whether it was negligence on the part of the defendants not to have the ring tested before it was used, and if so, whether they are responsible for the damage that ensued. In every other respect the defendants seem to have exercised due care. The ring was but a short time in use, and it had been manufactured according to specification by a firm of reputation and experience.

An unsuccessful attempt was made to show that it was of an obsolete pattern, and that its workmanship was generally unsatisfactory. Where there exists a manifest and sufficient cause of an accident it is folly to seek to account for it by a doubtful and inadequate explanation. The ring gave way where the two ends of the bar were joined, and an inspection of the fracture shows a substantial defect in the welding, which had the effect of reducing consider-

was moored in Kingstown Harbour, which is a harbour of refuge, by a cable attached to one of the ship's anchors, and another cable attached to a mooring buoy. During a full gale the ship parted from her moorings, and sustained the injuries complained of. The negligence of the defendants was, by the statement of claim, alleged to consist of negligent directions by their servants in relation to the mooring of the ship, and negligence in relation to the buoy, the mooring ring of which was alleged to be defective and insufficient for its purpose, and by the breaking of which the plaintiffs alleged that the ship parted from her moorings, and was injured. Besides traverses, there was a defence of contributory negligence on the part of the plaintiffs.

The action was tried by Mr. Justice (now Lord Justice) Holmes without a jury. The real questions at the trial were, first and mainly, as to the defendants' negligence in relation to the defective condition of the mooring ring of the buoy, and next as to contributory negligence on the part of the plaintiffs.

ably its power of resistance. If it had not been for this, it would not have broken at the time it did. It would have been capable of sustaining a greater strain than it was then subjected to, and perhaps greater than it would ever have been subjected to. I attribute the accident to this defect, but it is admitted that the defect could not have been discovered by mere inspection. I shall hereafter consider whether it was the duty of the defendants to have the ring tested, but apart from this point, I acquit them of every other kind of negligence. At the same time I can find no evidence of contributory negligence. The master and the two officers seem to me to be careful and intelligent men. If the assistant harbour master gave them instructions to the effect deposed to by him in the witness chair, they might be excused for not understanding him, but it is clear that they appreciated better than he did the functions of the buoy and their duty in regard to it. The buoy with its chain attached to the bottom of the harbour served as a port anchor. As long as the ship was moored to the buoy it could not drop a second anchor, nor would it be necessary to do so. In fact the very object of providing that a ship in the harbour should be attached to a buoy was to secure all the advantages of a second anchor in the event of a gale arising. All through the 7th October, the vessel rode with fifteen fathoms of cable to the buoy, in addition to the buoy's own chain of thirteen fathoms, and with a chain of thirty five fathoms to the starboard anchor. At one o'clock on the morning of the 8th, it was blowing a whole gale, and all hands were summoned to increase the length of the port chain so as to divide the strain as far as possible. There was then paid out on that side fifteen fathoms additional, thus

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The learned Judge found:—

1. That the defendants were guilty of negligence in not having the mooring ring (in the finding called the "spindle") of the buoy tested before it was used.

2. That this negligence was the cause of the injuries complained of.

3. That the plaintiffs did not contribute to the accident by negligence on their part; and he assessed the plaintiffs' damages at £1870, and gave judgment for them accordingly.

The defendants then moved this Court to enter the judgment for them, on the grounds that the learned Judge was wrong in finding as he did, and that his findings were without evidence to sustain them, and against evidence and the weight of evidence, and that he should have given judgment for the defendants, or that this Court should make an order for a new trial. The question mainly argued before us was that which had constituted the principal contention at the trial, viz. whether there was suffi-

giving forty-three in all as against thirty-five for the starboard anchor. This, according to both master and mate, made everything fair and square. A great effort has been made to convince me that more chain ought to have been let out. I do not attach much importance to the evidence of theorists after the event. Forty-three and thirty-five fathoms of chain in four fathoms depth of water, seem an extremely liberal allowance. The harbour is small, and a fair way was to be kept for the mail steamer. The master, who was on deck for hours had abundant opportunity of forming a correct judgment; and it was just as easy for him when the glut was taken out of the windlass at one o'clock to have let out more chain or less. He was entitled to assume that the ring of the buoy, which was in truth a link in an anchor chain, was without flaw and as capable of holding as the chains of his own ship. So it would if it had not been for the defect in the welding; and, therefore, I am of opinion, not only that the master acted with due care, but also that nothing that he did or omitted to do, contributed to the accident. The critical question of the absence of testing remains to be considered. The manufacturers of the buoy proved that such a flaw as occurred in the welding is very common, and that it cannot be guarded against by the most careful workmanship. It is also established by the evidence that manufacturers do not submit these rings or spindles to any test unless testing is specially specified and paid for, in which case they are tested according to a well-known and recognised method by a public body, meaning, I presume, one of the bodies authorised to test ships' chains and anchors. I am further satisfied from the evidence that persons ordering these articles often specify that they are to be tested, but that this practice is

cient evidence of negligence on the part of the defendants in relation to the defective condition of the mooring ring of the buoy.

When an action is tried by a Judge without a jury, the question whether his findings, and the judgment given by him at the trial, should be disturbed, is not altogether the same as if the question arose in an action tried by a jury; but it lies at least on the party who seeks to disturb them to make out to the satisfaction of the Court that the Judge at the trial was wrong. If authority for so apparently obvious a proposition be required, I may refer to the case of the *Colonial Securities Trust Company* v. *Massey* (1). If the question before the Court relates to the sufficiency or the weight of the evidence given at the trial, due and reasonable regard should be had to the fact that the Judge at the trial before whom the evidence was given, was in a better position to estimate its sufficiency and weight than the Court is, which, in most cases, as in the present case, has before it what practically can only

as yet not general. Mr. Campbell tried to convince me that a defect of this kind could not have been detected by a test. He will pardon me for saying that I was unable to understand this part of his argument. It is too late in a country in which the testing of cable chains has been carried on under statutory provisions for upwards of thirty years to contend that testing of this kind is wholly ineffective. It is manifest that the breaking strain of this spindle was much less than it ought to have been by reason of the flaw in the welding. Surely then it could not have withstood a test appropriate to a sound spindle of the same shape, character, and dimensions. If the defendants were ignorant of the foregoing facts, it was their duty to have known them. I believe that they did know them, for their engineer says that the ring "was not specified to be tested, as that is an unusual practice; in lieu of a test we leave a large margin for safety." A more extraordinary statement coming from a public officer I have rarely heard. If it really represents the policy of the defendants, it indicates a deliberate intention on their part to make the safety of the vessels that are obliged to use the buoys, to depend upon the merest guess work. We have then a body which has charge of a harbour of refuge, and which undertakes to apply for the use of the ships seeking its protection appliances that are admittedly subject to latent defects, neglecting to employ the only means by which those defects can be discovered. If this is not culpabable negligence I do not know what is. I therefore find:—

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be a more or less abbreviated report, taken from the Judge's notes. Referring to the learned Judge's report, I shall now proceed to examine the evidence on the first question.

It was proved, beyond dispute, at the trial of this action that the mooring ring of the buoy, to which one of the ship's cables was attached, in accordance with the defendants' own by-laws, had a very substantial defect, which was not, however, discoverable by external inspection, nor, as I will assume, by the ordinary test of sounding it with a hammer to ascertain its tone. The defect arose from insufficient welding of the ring where it broke. It was received by the defendants in January, 1896, the buoy (with the ring as part of it) having been ordered in 1895 from a firm of high reputation, but to be made according to a specification which did not specify that it was to be tested. James Maxton, a consulting engineer and naval architect, one of the plaintiffs' witnesses, said he had inspected the broken ring; that the metal had not been welded properly; and that the defective welding

1. That the defendants were guilty of negligence in not having the spindle tested before it was used;

2. That this negligence was the cause of the injuries to the plaintiffs' vessel; and,

3. That the plaintiffs did not contribute to the accident by negligence on their part.

Now the question of damages which remains is, in this case, a difficult one. I have never known a plaintiff come into Court with evidence so unsatisfactory on this subject. Though the accident happened many months ago, the repairs have not yet been completed, and the gentleman who is engaged in repairing the vessel cannot state the amount that has been expended on her, or the amount which will be required to complete the repairs. The other evidence is equally vague, and the vessel has been treated in the way an unconscientious medical man treats a patient who has suffered in a railway accident, and is bringing an action against the Company; everything is done, except to cure him, and nothing is done to bring that about till after the trial. Under these circumstances I am placed in a very great difficulty. The bill of expenses paid by the ship's agent cannot possibly be allowed, as it runs over a period of several months, when it was the obvious duty of the plaintiffs, in this case, to take immediate steps to have the damage repaired. The evidence is that the damage could be repaired in three weeks. It would be necessary also to have the vessel patched up so that she might be brought to a proper shipping yard for repairs. The Liffey is not like the Clyde or Thames, or Mersey, where this work can be done immedilately, and some expenses must be incurred, and repairs made, before the vessel

could easily have been detected by testing. J. M'William, another of the plaintiffs' witnesses, and a surveyor to Lloyds, who had also examined the broken ring, said:—"A considerable section of it was not welded at all, 5 inches long by 3 quarters wide. This left it weak. It could not have been seen before the fracture. It was, however, an illformed weld, such as would lead anyone to suspect it. It would have been detected at once if it had been tested." Caleb Smith, a maker of buoys, and another witness for the plaintiffs, said he had examined the fracture. "It was caused by faulty welding. The flaw was $\frac{7}{8}$ of an inch, and extending right across. That portion had never been welded. The defect might have occurred by a little dirt having got in. The metal is not good, and the workmanship is rough. I am sure the defect could have been discovered." In cross-examination he said:—"In all mooring buoys for public dock yards testing is generally included in the specification, and it is then sent to a public testing machine. Any person that wishes to get a good ring of this kind

is brought into the graving dock. But having regard to the vague evidence given for the plaintiffs, I am obliged to be most careful in awarding damages in this case, and to keep well within the amount which would be awarded upon an inquiry. I do not think, however, that I am inflicting any loss on the plaintiffs in the estimate at which I have arrived, as if I were to direct an inquiry, it would be at the plaintiffs' cost. I have done my best and the conclusion to which I have come is this:—I give £1400 for repairs—it may cost something more than this—but, having regard to the vagueness of the evidence before me, I do not see how a larger amount can be awarded. The next sum I give is £100 for salvage claims paid by the plaintiffs. That seems to have been a very reasonable and moderate settlement, and the plaintiffs must be reimbursed the amount. Then comes the claim for demurrage. The period should not be more than five weeks at the outside; and, for many reasons, I am not disposed to adopt the hard and fast rule said to be acted on by the Admiralty Court in England, but shall try to make the amount approach more closely to what was the actual loss by the accident, and I think that I am right if I estimate it, on the basis of five weeks, or thereabouts, at the sum of £120, including the wages of the master and mate. Lastly, I come to the expenses included in the agent's bill—some of which were necessary—such as patching up the vessel, wages, and other charges. I think that if I give £250 for these it would be a reasonable amount. The result of these sums is altogether £1870. Having, therefore, found these questions of fact that I have mentioned, I find generally for the plaintiffs, with £1870 damages, and costs.

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can specify that it be tested, and it is then tested under the authority of the Board of Trade. This is very generally done in specifications, but it increases the price." Samuel Smith, foreman of the last witness, and a witness for the plaintiffs, said—"The interior (of the ring) is not welded. When the skin is gone it comes to the flaw, and a sudden jerk snaps it. Rings of this kind are tested, if it is specified." In cross-examination he said:—"You could not see the bad welding when it is closed. It is not always specified that it be tested."

The following evidence was given on this part of the case on behalf of the defendants:—Frederick J. Dick, assistant engineer to the Board of Works (who are in fact the defendants), said—"The buoy was ordered in 1895 from Bellamy & Co. That firm has a high reputation in this class of work. It was ordered and delivered according to specification. There was no indication to lead me to the conclusion that there was anything wrong. It looked rough forging, but there was nothing to indicate that it was weak forging. I saw the ring after it was broken. There is a small internal defect in the welding. If I had known that the ring had the defect which is now apparent, I would not have allowed it to be used at all. The strain during the storm would vary from eight to twenty tons. That would be the total strain on both cables." In cross-examination he said:—"I did not ascertain that the ring had been tested in any way. It was not specified to be tested, as that is an unusual practice. In lieu of a test we leave a large margin of safety."

The manager for Bellamy & Co. (called T. W. Ogan in the report) said—"The buoy and ring were made under my supervision. It was done with care and skill, and made of the best iron. The rings are examined, and tested with hammers. If a special test is required it is done by a public department, and specified for in the specification. This is not usual. In my opinion the breaking of the ring is to be attributed to defective workmanship, but the defect was not to be seen by external inspection. Such defects cannot be avoided. Sulphur or lead would cause it. It was impossible to avoid it." In cross-examination he said:—"Flaws and defects of this kind occur very often. There is only one firm that we do business for that requires, in its specification,

that 'spindles' (rings) be tested. Recently the Admiralty has asked for a test."

I have now referred to what I regard as the substantially material portions of the evidence bearing on the question as to the defendants' negligence; and, in relation to that question, the case as it appears to me stands thus:—Kingstown Harbour is a harbour of refuge, and it is well known that it is liable to be seriously agitated in storms. The defendants have the control of it and its mooring buoys. They know it is likely to be resorted to by ships seeking refuge from storms. The ship in question, although large, is not alleged to be, and cannot be regarded as, of unusual or exceptional size, and the gale, although a full one at the time of the accident, was not shown to have been one which may not be naturally expected to occur. The reasonable care, which it has not been questioned that the defendents were bound to exercise, ought to be estimated with reference to the circumstances, and I hold that their duty, under the circumstances, was to exercise a high degree of care for the protection of the lives of crews, and the security of ships and cargoes, which might be lost by the absence of such care in relation to matters under the defendants' control, including the mooring buoys. One of the important parts of the buoy in question, viz. the mooring ring, was in fact seriously defective, and to such an extent that Mr. Dick, the defendants' assistant-engineer, would not, as he said, have allowed it to be used at all if he had known of the defect which existed. Similar defects are not unusual, and may be reasonably anticipated. They very often occur (Ogan's evidence), and, according to him, it is impossible to avoid their occurrence. There is a known mode of testing, knowledge of which was not denied by the defendants. It was referred to during the argument as a special test; it subjects the article tested to a strain, and it manifestly is a much better test than what were referred to as the ordinary tests of inspection and sounding with a hammer. It was urged (and there was some evidence) that this special test is unusual, and that it increases expense, but it was not even suggested, and apparently could not be contended, that it was not well known to the defendants; and, in my opinion, in a case like the present, where the harbour is a harbour of refuge, and liable to be seriously affected by storms; when life

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and property are repeatedly at stake in it, and when the defect in the mooring ring was a very usual one, and could not be detected by what were described as the ordinary tests, the facts that the special test was unusual (even assuming it to have been so), and that it would to some extent increase expense, constitute no excuse whatever for the omission to employ it on the part of a public body with so grave responsibilities as rest on the defendants in the discharge of their duties as Commissioners of Kingstown Harbour. But, as was strenuously argued by Mr. Campbell for the defendants, what is this special test to be? If it is negligence to omit it, to what length are the defendants to go? Must they not, to protect themselves from the charge of negligence, require the application of a test equal to the severest strain which the largest ship that can enter the harbour will exert in the heaviest gale that will blow; and would it be reasonable to require such a test? I answer that the question we have to deal with is, did the defendants use reasonable care, having regard to the facts and circumstances of the case we have before us—and not having regard to some other and very exceptional case which is not before us. It was for them to exercise such care as the circumstances demanded in relation to the sufficiency of the buoy as a mooring buoy. They are not to make a mere guess at its sufficiency; they are bound, with due diligence, and having regard to what may be reasonably anticipated, to carefully estimate what its strength and fitness ought to be. Mr. Dick, their engineer, said, "in lieu of a test we leave a large margin of safety." How is that margin to be ascertained but by an estimate of what the strength of the ring ought to be, and then giving it an increased strength for the margin? How is this done? Manifestly by increasing the bulk of the metal which forms the ring. But if, as often occurs, a serious defect may exist, and both its existence and extent are undiscoverable by the ordinary tests, what becomes of the estimate of the margin of safety? It seems to me that in a case like the present the defendants' mode of providing a margin of safety becomes little better than mere guess-work, and that the known risk remains unguarded against. The sufficiency of the ring is thus left very much to chance. In my opinion the defendants' duty to exercise reasonable care in such a case is not discharged unless

they both estimate with due care, skill, and diligence, what the strength of the ring ought to be (which in my judgment it lies on them to do), and also adopt all reasonable means of ascertaining before using it that it in fact has that strength at the least. I think it a legitimate inference from the evidence that a due and reasonable application of the special test by strain would have disclosed the defect which existed, and I am not only not satisfied that the learned Judge was wrong in finding that there was negligence on the part of the defendants in omitting to have the special test applied to the ring, but I feel at liberty to add that I am satisfied that his finding was right.

This disposes of the main contention on the part of the defendants. As regards the law relating to negligence I have applied to the facts nothing but the familiar and settled principle that the omission on the part of those whose duty it is to use due and reasonable care, in relation to the matter in hand, to adopt a reasonable precaution by which injurious results might reasonably have been prevented is negligence in point of law; and I venture to add that it is also negligence according to common sense. There is nothing to the contrary in the case of *Hanrahan* v. *The Ardnamult Steamship Co.* (1), a very different case, in which no evidence was given to affect the defendants with negligence, or to justify the inference that they ought to have known, or anticipated the defective condition of the bolt which gave way. They may or may not have been, in fact, negligent; but the decision was that there was no evidence of negligence on their part, unlike the case of *Murphy* v. *Phillips* (2), which was cited in *Hanrahan's Case* (1), and also in the argument here, and in which, as in the present case, evidence was given which in *Hanrahan's Case* (1) was wanting. The case of *Readhead* v. *The Midland Railway Company* (3) was a case of alleged negligence in the carriage of a passenger, and affirmed the proposition that the contract to carry him did not involve a warranty by way of insurance to carry him safely, or a warranty that the carriage he travelled in should be free from all defects, though such that no skill, care, or foresight could have detected their existence, but only an obligation to use due care, skill, and foresight in relation

(1) 22 L. R. Ir. 55. (2) 35 L. T. (N. S.) 477.
(3) L. R. 2 Q. B. 412, and in Exch. Ch. L. R. 4 Q. B. 379.

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to the carrying of him safely. In *Richardson* v. *The Great Eastern Railway Company* (1) the Court of Appeal held on the facts of that case, which are of quite a different character from the facts in the present case, that, on the findings of the jury, the defendants' obligation to use due diligence had been discharged. *Daniel* v. *The Directors of the Metropolitan Railway Company* (2) was also a case of alleged negligence in carrying a passenger. It was held on the facts of that case that the falling of a girder, which injured the plaintiff, from works which the defendants had no control over, was not an occurrence which they ought to have anticipated and taken precautions against, and that, therefore, they were not liable to the plaintiff. I do not think it necessary to make any further reference to the cases cited during the argument, none of which can, in my opinion, be regarded as in favour of the defendants in the present case.

With reference to the second and third findings by the learned Judge, viz. that the defendants' negligence was the cause of the injuries to the plaintiffs' ship, and that there was not contributory negligence on the part of the plaintiffs, I think it unnecessary to occupy time by any lengthened examination of the evidence. On these questions the Judge had the evidence of F. W. Price, the master of the ship, and of C. H. Hall, the mate, and he had in the defendants' by-law, No. 2, what I regard as corroboration of their account of the mooring of the ship, as that by-law required a ship, such as the plaintiffs, to moor to a service-mooring buoy, and in bad weather to let go one anchor, and to veer to fifteen fathoms on both chains to ease moorings. The master and mate's evidence was to the effect that the assistant harbour master (F. May) gave directions in relation to mooring the ship both to the buoy and by the anchor, and did not state that the buoy was not there to hold the vessel, but only to assist the anchors. There is, in my opinion, nothing in their evidence, or in that of the second mate, Ryan, to show that there was any want of due care and skill in the management of the ship and her cables during the gale, or that the ring of the buoy was exposed to any strain which might not have been reasonably expected under the circum-

(1) 1 C. P. D. 342. (2) L. R. 5 H. L. 45.

stances; and I think it a fair and legitimate inference from the entire evidence that the first thing which gave way was the ring of the buoy, and that this was the cause of the ship parting from her moorings, and sustaining the injuries she received. F. May's evidence was that he told the master that the buoys were not intended to hold a vessel in bad weather, and that he must depend solely on his anchors, which E. Knight, one of the crew of the harbour master's boat, stated he heard said, but, he added, that it was understood that the master was to keep his cable shackled to the buoy, and that he could not, while it was so shackled, let go a second anchor. Alexander Walker, an officer of the Dublin Marine Board, said the vessel required special precautions to hold her in her place, and he did not think she was properly moored. All this evidence was for the consideration of the Judge, who heard and saw the witnesses, and had, to that extent, an advantage we have not, and he was entitled to weigh, as he did, the probabilities which presented themselves on the evidence. I am wholly unable to say that I am satisfied he was wrong in either the second or third of his findings, and the strong leaning of my opinion on the facts as reported is that he was right in both.

No question was raised respecting the assessment of damages; and, on the entire of the case, I am of opinion that the findings of the learned Judge and the judgment he gave for the plaintiffs ought not to be disturbed, and that the defendants' motion ought to be refused with costs.

MADDEN, J.:—

I am not surprised that Mr. Campbell laboured hard to prove that the learned Judge was wrong in holding that the part of the mooring tackle that first gave way was the ring of the buoy. For upon this matter of fact depends, in my opinion, the decision of the case. If the defendants could satisfy us that the ring of the buoy had been subjected to an exceptional strain, they might fairly argue that it was no part of their duty to supply a ring of exceptional strength. But if the ring gave way when subjected to no more than an ordinary strain, it was plainly inadequate, and the burden is cast upon the defendants of proving that they

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had done all that in them lay reasonably to insure the efficiency of the buoy for the purpose for which it was intended.

The learned Judge has negatived the suggestion that the cotter pin broke first, with the result that the starboard cable ran out, and caused the vessel to bear upon the buoy with a sudden jerk. He has also negatived the suggestion that there was contributory negligence on the part of the plaintiffs in regard to the management of the vessel. I entirely agree in those findings, which appear to me to be in accordance with the positive evidence, as well as the probabilities of the case, and on this part of the case I add nothing to what has been said by my brother Andrews.

Starting then with the proposition that the ring broke first, let us see to what conclusion it leads. The ring when it broke was serving the purpose for which it was intended—no more and no less. Kingstown is a harbour of refuge. The "Mary Burrell," a ship of 1449 tons, is a vessel of the class which might reasonably be expected to make use of such a harbour. No doubt, at the time when the ring gave way, it was blowing a heavy gale. But it was in view of such an event that the vessel entered the harbour for protection. It can hardly be contended that a buoy is adequate for the purposes of a harbour of refuge, if it cannot bear the strain of a gale, heavy, but no heavier, than those by which our coasts are frequently visited. The case would be altogether different if the buoy had been subjected, by the breaking of the cotter pin, to a sudden jerk, or to an abnormal strain. Those are contingencies for which the defendants are not bound to provide. But they are, in my opinion, bound under the by-laws to provide buoys adequate to the ordinary purposes of the harbour. To apply this proposition to the facts of the case before us, they were bound to provide a buoy sufficiently strong to hold, with the aid of an anchor, a vessel of the tonnage of the "Mary Burrell," during the night of the 8th of October.

Now, as a matter of fact, the buoy failed to serve this purpose. It broke. The cause of the fracture is clearly proved. There was a flaw in the welding of the ring, not discoverable by mere inspection. The existence of this flaw is admitted, and where there is clear evidence of a defect quite sufficient to account for what

occurred, it is needless to look about for any other explanation of the accident.

The defendants having thus, as a matter of fact, supplied a defective buoy, are bound to prove, if they would negative the inference of actionable negligence, that they used reasonable diligence in endeavouring to procure a trustworthy article. They endeavour to satisfy the burden thus cast upon them by proving that they obtained a ring of somewhat more than ordinary thickness, from a first class firm of manufacturers.

Some years ago this would probably have been sufficient. It has, however, been clearly proved that a mode of testing is now in use by which the existence of the flaw in the welding of the ring could have been detected. This is indeed admitted. T. W. Ogan, a witness for the defendants, says:—"If a special test is required it is done by a public department, and specified for in the specification." The public department referred to is that by which chain cables are tested under the Chain Cable Acts referred to by my brother Andrews. That the existence and efficiency of this test was known to the defendants is proved by the evidence of their assistant engineer, Mr. Dick, who says:—"I did not ascertain that the ring had been tested in any way. It was not specified so to be tested, as that is an unusual practice. In lieu of a test we leave a large margin of safety." That is to say, instead of providing a ring, the breaking strain of which, if sound, would have been sufficient to meet all reasonable requirements, and ascertaining its soundness by means of a test with which we are acquainted, we provide a stouter ring, and take chance, that the extra thickness of the ring will compensate for any latent flaw that may happen to occur in the welding.

In adopting this haphazard course, with knowledge of an effective test, the defendants were, in my opinion, clearly guilty of negligence. It is urged on their behalf that the use of a test is not usual in the case of buoys, although it is compulsory in the case of cables. This consideration would be most material if it were sought to bring home to the defendants knowledge of the efficiency of the test by proof of its general use. It is, in my opinion, immaterial where such knowledge is either directly proved or (as here) admitted, and I fail to see that the ignorance or carelessness of

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others affords any ground of defence to those who deliberately sin against light and knowledge.

The case mainly relied on, on behalf of the defendants, was *Hanrahan* v. *Ardnamult Steamship Co.* (1). In that case the action was founded upon injuries caused by the breaking of an iron bolt supporting the derrick used in discharging the ship's cargo. The strength of the bolt had become impaired by rust, but there was no evidence that it was originally defective, and the greater part of it was concealed from sight, and could not be examined without withdrawing it from the trestle-tree in which it was fixed. "No evidence was given for the plaintiff as to what was usual or requisite in reference to inspections of iron vessels of this class, or for what period a bolt, such as this, would, in the ordinary course remain in repair and be adequate to its work." (*Per* Palles, C.B.) In that case it was held that there was no evidence of negligence. The Lord Chief Baron in his judgment, in distinguishing the case from *Murphy* v. *Phillips* (2), pointed out that it was there proved that there were well known and ordinary methods for testing chains adopted by persons called "chain testers," employed for the purpose. It has not been suggested on behalf of the defendants that there are greater difficulties in submitting to a proper test the ring attached to a buoy than the cable which connects it with the ship. The plaintiff is not bound to specify the precise strain up to which the ring ought to be tested. The duty rests on the defendants of providing a sufficiently strong ring. They are, in my opinion, bound to form a reasonable estimate of the strain which it ought to bear, and to have it tested accordingly. For this reason I concur in the judgment of my brother Andrews.

BOYD, J.:—

I agree with the result which has been arrived at by the other members of the Court, but at the same time I desire to express my opinion on some of the points which appear to me to have been overlooked during the progress of the trial.

The "Mary Burrell," the plaintiffs' vessel, arrived in Kingstown Harbour, in ballast, on the 6th October, 1896, in charge of a

(1) 22 L. R. Ir. 55. (2) 35 L. T. (N. S.) 477.

pilot, and let go her starboard anchor in the vicinity of the hauling buoy near the mouth of the harbour, and gave out 30 fathoms of chain to her anchor, and made fast with her port chain to the ring on the buoy with 14 or 15 fathoms of chain out. When they were shackling the chain to the buoy the assistant harbour-master came alongside, and though there is some discrepancy in the evidence as to the words used by him, it is admitted that he gave directions that an equal strain should be kept on the anchor and on the buoy. At 6 o'clock on that evening there were 35 fathoms to the anchor and 14 or 15 fathoms to the buoy. It therefore appears that after the mooring 5 fathoms more chain must have been given to the anchor. During the night of the 6th and the day of the 7th it was calm, but at 11 o'clock on the night of the 7th it commenced to blow, and increased to a moderate gale from S.S.W. At 1 o'clock, a.m., on the 8th, the captain states he examined the chains, and then discovered the vessel was not riding evenly to the buoy and the anchor, as he had been directed to do by the harbour-master. He then called all hands and gave 15 fathoms extra on the buoy, and there was then, as he states, an equal strain.

It is manifest from this that either the vessel must have dragged her anchor, or the chain must have rendered over the windlass, the compressor failing to act, or she stretched the slack of the chain which had not been properly stretched when paying out, the result being that he had to give 15 or 16 fathoms more chain to the buoy to make her ride, as he describes it, "fair and square." The wind then blew a full gale; about 3 o'clock the ring on the buoy parted, and the vessel gave a heavy roll to starboard, and brought up with a jerk on the anchor—this caused a sudden and great strain on the compressor by which the chain was kept firm to the windlass; the result being that the iron bolt by which the compressor was attached to the deck was drawn up, shearing off the cotter pin by which it had been secured below the deck.

It was argued on behalf of the defendants that the compressor bolt first gave way and caused a jerk on the buoy, and thereby broke the ring. I, however, have come to the conclusion from the evidence, and assuming it, as I must, to be correct, that the ring broke first, as this alone would account for the vessel taking

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"a heavy roll to starboard." Had the compressor bolt first given up the roll would have been to port. It was also contended on behalf of the defendants that before the ring broke it was drawn out of shape—from being round, into an oval—and that this proved an undue strain had been put upon it, and but for such undue strain it was sufficiently strong. I was greatly influenced by this argument when I saw only the photograph of the buoy; but when the ring itself was produced in Court it showed that it had not been drawn out of shape except on one side, and this manifestly occurred after the ring became fractured.

Had the ring been sound, it, in my opinion, would have been of sufficient strength for the purpose for which it was supplied, but the flaw in the welding reduced its strength to such an extent as to render it unfit and unsuitable for that purpose. Although I am of opinion that sufficient care had not been taken in the mooring of the said vessel, and in seeing that an equal strain was kept on each chain, and that for a time an undue strain was allowed upon the ring of the buoy, these defects were remedied without injury to the ring of the buoy some two hours before the accident. The wind increased to a whole gale afterwards, and when the vessel was riding as described "fair and square," the defect in the welding of the ring caused it to give way, and thus the accident occurred. I think it might well have been contended at the trial that a glut should have been put into the starboard windlass to back up the compressor, or at all events that the end of the starboard chain should have been secured in the chain locker. Had it been so secured it could not have all run out, as it did, and the vessel would not have sustained the injuries. It was stated in the plaintiffs' evidence that securing the starboard chain with a glut would have prevented the chain being eased out. The port chain though so secured was eased out 15 or 16 fathoms when all the strain was on it, and I do not see why a second glut could not have been applied to the starboard windlass, at all events to back up the compressor. These points were not made at the trial, or if made were not pressed, and therefore cannot now be relied on as evidence of contributory negligence.

On the whole I think the case of the defendants was mainly rested on the absence of negligence on the part of the Commissioners,

and the substantial question to be now decided is whether the injuries complained of resulted from their negligence.

What is the negligence for which they would be liable? Kingstown Harbour being a harbour of refuge, the highest degree of care should be exercised to make the mooring buoys safe for vessels resorting to it in bad weather. The by-laws of the harbour expressly require vessels to moor to the buoys in a certain manner: see by-law 2 (1). In *Ford* v. *London and South Western Railway Company* (2), Chief Justice Erle says:—"Negligence is not to be defined, because it involves some inquiry as to the degree of care required from the parties considering all the circumstances. The Railway Company is bound to take *reasonable care; to use the best precautions in known practical use, for securing the safety of their passengers.*"

In *Readhead* v. *The Midland Railway Company* (3), Montague Smith, J., states the law applicable to this case as follows:—"But the duty to take due care, however widely construed, or however rigorously enforced, will not, as the present action seeks to do, subject the defendants to the plain injustice of being compelled by the law to make reparation for a disaster arising from a latent defect in the machinery which they are obliged to use, *which no human skill or care could either have prevented or detected.*" Again, in *Daniel* v. *The Metropolitan Railway Company* (4), Willes, J., states:—"It is necessary for the plaintiff to establish by evidence circumstances from which it may fairly be inferred that there is reasonable probability that the accident resulted from the want of some precaution which the defendants might and ought to have resorted to; and I go further and say that the plaintiff should also show with reasonable certainty what particular precaution should have been taken."

Now, applying the law as laid down in these and other cases to the present case, it was proved by the plaintiffs that there was a reasonable precaution in known practical use for testing rings such as the one which broke on the occasion of the

(1) This by-law is stated in terms in the judgment of Kenny, J., *infra*, p. 292.

(2) 2 F. & F. 730, at p. 732.

(3) L. R. 4 Q. B. 379 (in the Exch. Chamber), at p. 393.

(4) L. R. 3 C. P. 222.

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accident in this case. This test was not applied to this ring. It was also admitted by the defendants' witnesses that defects such as existed in the ring cannot be avoided, and that they occur very often. Surely if such be the case, "the best precaution in known practical use," to use the words of Chief Justice Erle, should have been taken to discover them. Undoubtedly the best known precaution in practical use is testing, and this was not adopted. The only test applied was with hammers, a crude and uncertain test. It did not discover the very serious flaw which admittedly existed in this ring from the time it was forged. "In lieu of a test," the witness Dick states, "we leave a large margin of safety." But what is the use of a margin of safety if the defect exists in it as well as in the rest of the ring? The flaw in this case was $\frac{7}{8}$ of an inch wide, and extended right across the whole thickness of the ring, that is through the margin of safety. What the margin allowed has not been proved, but it could not have amounted to a third of the thickness of the ring, which was only three inches. But what becomes of this haphazard margin of safety in the face of the evidence given by Dick himself, who says:—"If I had known that the ring had the defect which is now apparent I would not have allowed it to be used at all."

In my opinion he might have known of the defect if he had applied a reasonable test instead of trusting to his undefined margin of safety.

The ring was only made in 1896, at which time it is proved that one firm out of five who employ the makers of the ring required in their specifications that rings made for them should be tested. The Admiralty also require testing. Had Mr. Dick put into his specification that this ring should be tested, instead of relying on his margin of safety, it would have cost a small sum extra, but it would have insured the safety of the vessel, and would have relieved the defendants from being liable for negligence in omitting a precaution in known practical use.

KENNY, J.

This action was tried before Lord Justice Holmes, without a jury, and by his judgment he found (1) that the defendants were guilty of negligence in not having the ring of the buoy tested before it was used; (2) that this negligence was the cause of the injuries to the plaintiffs' vessel; and (3) that there was no contributory negligence. Although there was a considerable amount of discussion before us as to the immediate cause of the breaking of the ring and as to the manner in which the vessel was moored both to the buoy and to her own anchor, the controversy, in substance, resolved itself into the question of whether the Commissioners of Kingstown Harbour were guilty of negligence in not having the ring tested by certain special methods instead of, or in addition to, the simple and very ordinary method of hammering.

On some of the questions of fact in the case I cannot allow myself to entertain a doubt. It is clear to my mind, on the evidence, that the ring broke before the cotter pin, and that the breaking of the latter was due to the sudden jerk to starboard of the vessel, when she parted with her port mooring. The Commissioners say that on this question they are at the mercy of the master and mate. Unquestionably that is so; but I see no ground whatever for disbelieving what these men have sworn, namely, that the ship bounded up with a sudden jerk on the starboard chain, and fell away from the buoy, and that the cotter pin of the starboard compressor then broke. There is nothing to controvert or even, in my judgment, to raise a doubt as to the truth of that evidence, save mere speculation. We were asked to come to the conclusion that the vessel was injudiciously, if not improperly, moored, that it might well be inferred that the "jerk to starboard" and the breaking of the cotter pin that held down the starboard compressor were almost simultaneous, and, so far as continuity of events was concerned, that the cotter pin broke first, and thereby caused the ship to lurch, and put an undue strain on the ring of the buoy. To assume any of these matters I would require to speculate with very weak material; and in the face of the positive and direct evidence the other way, I feel that I am not at liberty to do so.

Being satisfied that the ring of the buoy broke before the

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cotter pin, I cannot but conclude that it was this circumstance that led to the drifting of the ship from her moorings. When the ring broke, the ship with a sudden bound fell away to starboard, and I entertain no doubt that it was at that point of time that the cotter pin of the starboard compressor broke and allowed the starboard cable to go with a run. I cannot go behind the evidence on this point of the captain and mate; and under the circumstances it is clear that the fracture of the cotter pin was the direct result of the sudden jerk of the ship caused by the parting of her port mooring.

The breaking of the ring being, in my judgment, the *causa causans*, it remains to consider the question which both sides have regarded as the main one in the case, namely, whether the circumstances disclose a case of actionable negligence on the part of the Commissioners. This body, who are sued in the name of their secretary, have the management and supervision of Kingstown Harbour under the provisions of statutes which I need not refer to in detail. It is sufficient to say that upon the Commissioners lies the statutory obligation of (amongst other matters) providing proper moorings for the shipping that frequent the harbour. The latter is a harbour of refuge, open to the vessels of the whole world, without restriction, so far as I am aware, as to size or tonnage, and by-laws have been issued by the Commissioners for the regulation of the shipping and their moorings.

Counsel for the plaintiffs has presented a strong view of the obligation cast upon a harbour authority in the position in which the Board of Works are. They have to make provision for vessels of every tonnage and for all weathers. Their 2nd by-law, after dealing with cases of vessels drawing 20 feet and upwards, directs "other large vessels to moor to service-mooring buoys, and in bad weather to let go one anchor and to veer to 15 fathoms, on both chains, to ease moorings"; and the 12th by-law provides that every master of a ship coming into, or being in, the harbour is to conform, with respect to mooring, to the orders of the harbour master. If it were wanting, these by-laws contain within themselves a complete recognition of the duty and responsibility of the Commissioners, and I do not think that Mr. Ronan applied too lofty a standard when he contended that in circumstances involv-

ing constant peril to large numbers of the Queen's subjects, there were demanded the highest care and the best precautions in known practical use for securing the safety of these vessels and their crews in the pursuit of their hazardous calling. The law governing this case presents, I think, no difficulty. The application of it does.

There is no absolute undertaking by defendants that the mooring buoy is free from all defects. The obligation is to exercise due and reasonable care and foresight, having regard to the exigencies of the case. In *Christie* v. *Griggs* (1) Sir James Mansfield puts the duty as one to provide an article free from defect "as far as human care and foresight could go," and that language is adopted by Chief Baron Pigot in *Burns* v. *The Cork and Bandon Railway Co.* (2), and not dissented from in *Readhead* v. *The Midland Railway Co.* (3). The latter case was adopted by defendants' counsel as the leading authority on the subject of this class of negligence, and they appealed to it as deciding that, in the case of latent defects in an article, the only duty was to apply ordinary tests. In that case the accident was caused by the breaking of the tyre of a wheel of a carriage in which the plaintiff rode, and it was proved that there was a latent defect in the tyre caused by an air bubble in the welding—which defect could not be detected by inspection or by the usual tests. It was not suggested that there was any test that was omitted to be applied to the tyre, which if applied would have been effectual. The Court there held that under the circumstances the defect was one which no human skill or care could either have prevented or detected, and it differs wholly from the present case, where the contention throughout has been that a well recognised test which would have detected the latent defect was never applied. *Richardson* v. *The Great Eastern Railway Co.* (4) more strongly supports the defendants' contention, but, in my opinion, is quite distinguishable from the present case. There, a more minute examination than had been made might have discovered the defect that caused the accident, yet it was decided that there was no negligence. The defect was in a foreign truck that in the ordinary course of through traffic came

(1) 2 Camp. 81.
(2) 13 Ir. C. L. R. 548.
(3) L. R. 4 Q.B. 379.
(4) 1 C. P. D. 342.

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on defendants' line, and the Court held that they should look to what was reasonable in reference to the exigencies of the case, and that in order to have a minute examination of the truck in question the Company would have been obliged to stop all foreign trucks and empty them for the purpose of examination, and that the suggestion that they should do so was too absurd to bear discussion. The principle involved in this decision is also to be found in Chief Justice Erle's direction to the jury in *Ford* v. *London and South Western Railway Co.* (1) which has been referred to already.

To the same effect is the judgment of the present Master of the Rolls, Sir Nathaniel Lindley—then Mr. Justice Lindley—in *Hyman* v. *Nye* (2), and *Hanrahan* v. *The Ardnamult Steamship Company* (3). In the latter case a seaman was killed by the fall of a derrick while unloading a vessel, and it was proved that a bolt through which a rope worked in connection with the derrick was in a defective state and incapable of bearing a strain. The defect was unknown to the defendants, but an inspection would have disclosed it, and the question was whether it was for the jury to say that such inspection would have been a reasonable precaution. The Court upheld the verdict for the defendants, the Chief Baron observing that the case was a peculiar one, as no evidence was given for the plaintiff as to what was usual or requisite in reference to inspections, or for what period a bolt such as the one in question would remain in repair and adequate for its purpose.

While therefore the Commissioners were under no obligation to guarantee the absolute safety of the vessel when moored in the harbour, they were, in my opinion, bound to use every reasonable precaution that care, skill, and foresight, might suggest in the selection of the machinery for mooring, having regard to the exigencies of the case; or, in other words, having regard to the fact that vessels of every kind were invited to enter and use the harbour in all kinds of weather. I have come to the conclusion that they have failed in that obligation in not having had the ring of the buoy submitted to a test which would have detected the

(1) 2 F. & F. 730, 732. (2) 6 Q. B. D. 685. (3) 22 L. R. Ir. 55.

latent flaw. The ring was submitted to no test, save that of the hammer, and the evidence is overwhelming that if a straining test had been applied, the defect would at once have been discovered. Lord Justice Holmes was of opinion, on the evidence, that the practice of testing is not yet general, but that it would have been a reasonable precaution. It was proved by Caleb Smith, one of the plaintiffs' witnesses, that in all mooring buoys for public dock yards testing is generally included in the specification—that anyone who wishes to get a good ring can specify that it is to be tested, and that this is very generally done in specifications, but it increases the price. Then Mr. Ogan, the manager for Bellamy, who supplied this buoy, stated that the rings are tested with hammers, and if a special test is required it is done by a public department and specified for in the specification, but this was not usual. On cross examination he stated that Bellamy did business for five or six public bodies—that only one firm requires testing in its specification, and that recently the Admiralty have asked for a test. Mr. Dick, the assistant engineer of the Commissioners, made a most singular admission on cross-examination. He said—"It was not specified to be tested, as that is an unusual practice. In lieu of a test, we leave a large margin of safety." The commentary of defendants' counsel on this statement was that his clients provided a ring, stronger than would be required to meet the normal conditions of the shipping that resort to the harbour. But the reference is obviously to strength in outward appearance. A ring, no matter how large in diameter the metal of it might be, could not fulfil the conditions of strength, if it contained within itself a defect which would render it wholly ineffective under the normal circumstances for which it was provided.

In addition to this evidence, the Chain Cables Acts of 1864, 1871 and 1874, demonstrate that the Legislature regarded the testing of cables as of vital importance in the interests of the marine of the United Kingdom, and I cannot but regard the ring of a buoy as but a link in a cable. It seems to me, therefore that the method of testing by means of a strain was well known, or must be deemed to have been well known, to the Commissioners—that it was resorted to by individuals and public bodies who desired to be

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supplied with an article efficient for its purpose—that nothing short of a straining test would be an adequate one, and that the Commissioners having preferred to trust to the margin of safety which they thought a ring exceptionally strong in appearance would afford, did not take the only reasonable precaution which a prudent individual in the like position would have taken, and that their omission to do so must be regarded as actionable negligence.

Solicitors for the plaintiffs: *W. Hayes & Sons.*
Solicitor for the defendants: *Chief Crown Solicitor.*

J. P. B.

Q. B. Div. 1898. Jan. 14.

JACKSON *v.* ROSS (1).

Vendor and purchaser—Conditions of sale—Outgoings—County cess—Applotment.

A condition of sale provided that all outgoings would be discharged by the vendor up to the 1st November preceding the date of the sale:—

Held, that county cess applotted before this date, but not levied until after the conveyance, was payable by the vendor.

CASE STATED by the Lord Chief Baron on the hearing of a civil-bill appeal at the Armagh Summer Assizes, 1897.

The case was as follows:—

"The appellant issued a civil bill to recover £3 9*s.* 4½*d.*, being the amount of county cess paid by the appellant under the circumstances hereinafter stated.

The civil bill was heard at Armagh Easter Sessions, when it was dismissed on the merits with costs. An appeal from the dismiss came before me at the Summer Assizes, 1897, for county Armagh. I was informed by counsel for the appellant and for the respondent that there was not any fact in controversy, and that all material facts were admitted. Upon the facts so admitted a question arose which I considered proper to be decided by a Divi-

(1) Before ANDREWS, MADDEN, BOYD, and KENNY, JJ.

sional Court, and the parties so desiring I directed a case to be stated for the opinion of such Court.

On the 2nd December, 1896, by public auction the respondent sold and the appellant purchased, subject to certain conditions of sale, a farm of land situate in the townland of Lissheffield, in the county of Armagh, which was at the date of said sale, and had been for some years previously, in the occupation of the respondent, and which was held by her under a yearly tenancy.

The said conditions of sale, a copy of which signed by me and marked A is incorporated in this case, provided *inter alia* that all outgoings would be discharged by the vendor up to the 1st November, 1896, and that the purchase should be completed on the 22nd December, 1896 (1).

The purchase was duly completed, and the farm was conveyed by the respondent to the appellant by conveyance executed on the 28th January, 1897.

The said sum of £3 9*s.* 4½*d.* was the sum or proportion applotted and payable in respect of said farm of the Grand Jury cess duly presented by the Grand Jury for county Armagh at the Summer Assizes, 1896. The said sum of £3 9*s.* 4½*d.* was, within the period prescribed by law, and previously to 1st November, 1896, duly applotted by the treasurer of the said county on the said farm by applotment, duly entered and signed by him, but was not levied until after the date of the execution of said conveyance, and when the appellant was in occupation of the said farm. It was levied under warrant which was dated 1st September, 1896, and was issued before the 1st November, 1896; and the appellant was compelled to pay and did pay said sum of

(1) The following were the material conditions:—

CONDITION No. 3.—The purchaser shall pay the remainder of the purchase-money at the office of the auctioneer or the vendor's solicitor on the 22nd day of December, 1896, and upon the payment thereof the vendor and all necessary parties (if any) shall execute a proper conveyance of the property purchased, such conveyance, however, to be prepared and executed by and at the expense of the purchaser. The conveyance must be submitted to vendor's solicitor, with the usual approval fee of £2 2*s.*

CONDITION No. 7.—All outgoings will be discharged by the vendor up to the 1st day of November, 1896.

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£3 9s. 4½d. The appellant contends and the respondent denies that the appellant is entitled to recover said sum of £3 9s. 4½d. from the respondent as one of the outgoings which, under the said conditions of sale, the respondent was bound to discharge.

The question for the Divisional Court is whether the appellant is entitled to recover said sum from the respondent?"

Bates, for the appellant:—

The material provisions are 153rd section of 6 & 7 Vict. c. 116, and ss. 3 and 4 of 19 & 20 Vict. c. 63. The county cess applotted on this farm was a charge prior to and independently of same being actually levied: *Hussey* v. *Holmes* (1). As such charge it was, prior to 1st November, 1896, an "outgoing" within the meaning of the condition: *Midgley* v. *Coppock* (2).

The county cess must be a charge prior to actual levy, otherwise the collector could not enter the land to make the levy. The latest date on which it can be suggested that the charge definitely attached to the farm is the applotment and issue of warrant for collection. The warrant in this case is dated 1st September, and the amount was leviable on or at any time after that date.

If it was a charge on 1st November, 1896, it is clearly an "outgoing." In *Midgley* v. *Coppock* (2) the existence of the charge was unknown to both vendor and purchaser at date of the contract. It is a much stronger case than the present.

H. W. Jackson, for the respondent:—

It is not clear from appellant's contention whether he treats this claim for cess as a *charge*, or as an *outgoing*. Take it either way—if it is a *charge* it is not touched by the condition—it stands upon a higher footing than a mere outgoing—it is a charge created and secured by the section of the Act (153rd section, 6 & 7 Wm. 4, c. 116). The true reading of that section is that it is a charge, payable by the person in occupation at the time of levy, and by nobody else; it does not become a charge till actual levy. [ANDREWS, J.: Is it not a charge from applotment? It seems to me that the clause you rely on is inserted in the section for

(1) 3 Cr. & D. 397. (2) 4 Ex. Div. 309.

convenience of collection.] I contend that it is not; in any event until levy it would merely be a dormant charge, it could not be made effective against my client after she had gone out of occupation. It could not be made the subject-matter of a petition in the Land Judge's Court; nor could it be enforced by sale in the Chancery Division: *King* v. *Ardilaun* (1). Take it as an outgoing. When does it become so? Not until it goes out, *i. e.* at time of levy. [BOYD, J.: Is the liability of the parties to be determined by the whim of the collector?] No. Universal practice has fixed the time of collection in the spring—never before January. The parties knew this at time of contract—that is the reason of the dismiss—it follows and is founded on that practice. This custom is admitted as a fact upon the amended case. Suppose this had been a contest between tenant for life liable for outgoings and remainderman. *Re Boor* (2) is an express authority in my favour. It practically overrules *Midgley* v. *Coppock* (3), where, besides, the condition was much wider. I rely on the judgment of Crampton, J., in *Hussey* v. *Holmes* (4). The condition here is the ordinary one, and does not cover rates made before, but not demanded till after, completion. Dart (6th edition), V. & P., vol. i., p. 147, suggests that a special condition is necessary. Besides, it is just that the purchaser should bear this cess, as it is largely levied for works, the benefit of which will arise in the future—new roads, bridges, &c.

ANDREWS, J., in delivering the judgment of the Court, said that the appellant was plainly entitled to recover from the defendant (respondent) the sum of £3 9*s.* 4½*d.*, paid by him as county cess in respect of this farm, and the dismiss must be reversed. By the conditions of sale "all outgoings were to be discharged by the vendor up to the 1st November, 1896." Was this an outgoing at that date? Clearly it was. It became a charge on applotment, and it became leviable on the 1st September, 1896. The fact that it was not actually levied till 1897 did not prevent its being a charge (and so an outgoing

(1) [1894] 1 Ir. R. 48.
(2) 40 Ch. D. 572.
(3) 4 Ex. Div. 309.
(4) 3 Cr. & D. 397.

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included in the 7th condition of sale) before that period. In fact the applotment makes it a charge, and this applotment having been made before the 1st November, 1896, it was a charge before that date, and so was included in the condition of sale dealing with outgoings before the same period. The usage mentioned by Mr. Jackson that the cess was, as a matter of fact, never levied till the year following that of applotment, did not affect the rights of the parties. The Court would, therefore, answer the question put in the case stated in the affirmative.

Solicitors for the appellant (plaintiff): *E. D. Atkinson & Sons.*
Solicitor for the respondent (defendant): *J. E. Peel.*

J. P. B.

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Feb. 3.

GUNN *v.* GUNN (1).

Practice—Probate or matrimonial matter—Trial before a Judge without a jury—New trial motion—Appeal—Judicature (Ireland) Act, 1897 (60 & 61 *Vict. c.* 66)—*R. S. C. (Ir.), Order LXX., Rule* 46; *Order XXXIX., Rule* 1.

The existing Rules and Orders of the late Probate and Matrimonial Division remaining in full force until altered, notwithstanding the fusion of that Court with the Queen's Bench Division (see the Judicature, Ireland, Act, 1897, section 5)—an application for a rehearing, or to change verdict and judgment, in a probate or matrimonial cause tried without a jury, should be by appeal to the Court of Appeal.

MOTION to change the findings and judgment thereon of Mr. Justice Johnson, sitting at Nisi Prius without a jury, on the hearing before him of a petition for divorce. On the 8th November, 1897, Mr. Justice Andrews (to whom by order of the Lord Lieutenant all Probate and Matrimonial matters, other than trials, had been assigned) directed this cause to be set down to be tried, on the 22nd November, before the Court itself without a jury upon

(1) Before SIR P. O'BRIEN, L.C.J., and O'BRIEN and GIBSON, JJ.

certain issues. The cause was heard before Mr. Justice Johnson, without a jury, who found in favour of the respondent and gave judgment accordingly.

J. Chambers, for the petitioner, now applied to the Queen's Bench Division for an order to change the findings and to have judgment entered for the petitioner. He submitted that since the passing of the Judicature Act (Ireland), 1897, the application was properly made to the Divisional Court, and not to the Court of Appeal. He referred to section 5 of that Act, and to R.S.C. (Ir.), Order LXX., Rule 46; and Order XXXIX., Rule 1. [GIBSON, J., referred to *Re Campion, a bankrupt; M'Cabe's Case* (1).]

There was no appearance for the respondent.

THE COURT refused to entertain the application, holding that, as it was provided by the Judicature Act of 1897, section 5, that the existing rules and orders of the Probate and Matrimonial Division should "remain in full force until altered," the application should have been by appeal to the Court of Appeal.

Solicitor for the petitioner: *A. J. Lewis.*

A. E. R. J.

(1) Unreported.

Q. B. Div. Bankruptcy.
1898.
March 4, 11.

In re RICHARD DOWNES (1).

Bankruptcy (Ireland) Amendment Act, 1872 (35 & 36 *Vict. c.* 58), *s.* 52—*Settlement in consideration of marriage—Settlement in favour of purchaser or incumbrancer—Valuable consideration—Marriage of collateral relative.*

By the 52nd section of the Bankruptcy (Ireland) Amendment Act, 1872, the following *inter alia* are excepted from the settlements avoided by the section—(*a*) settlements made before and in consideration of marriage, or (*b*) made in favour of a purchaser or incumbrancer in good faith and for valuable consideration:—

Held, that exception (*a*) is confined to settlements made on the marriage of the settlor, and exception (*b*) to transactions for valuable consideration in the sense indicated by *Ex parte Hillman; In re Pumfrey* (10 Ch. D. 622).

Charge and Discharge.

The charge was filed by the assignees of the bankrupt, and sought for a declaration that an indenture of the 3rd December, 1896, made between the bankrupt of the 1st part, Catherine Downes, his sister, of the 2nd part, and Patrick King of the 3rd part, might be declared fraudulent and void.

By this deed after reciting that a marriage was then intended between Patrick King and Catherine Downes, and that on the treaty for the marriage Richard Downes (the bankrupt) had agreed to pay Patrick King £100 as a fortune for his sister, the said Richard Downes in consideration of the said marriage covenanted with the said Patrick King to pay him the said sum of £100 as follows—£50 on the 23rd May, 1897; £25 on the 23rd November, 1897; and £25 on the 23rd May, 1898; and for the purpose of securing the payment of the said sum of £100 to the said Patrick King the said Richard Downes charged the licensed house and premises at Feenagh, county Limerick, of which he was possessed, with the payment of the said sum of £100.

The deed was executed by Richard Downes and Patrick King.

(1) Before Boyd, J.

Richard Downes was adjudicated a bankrupt on the 29th June, 1897.

King married Catherine Downes on the 15th December, 1896. By his discharge he denied having had any knowledge at the date of the deed that the bankrupt was in embarrassed or insolvent circumstances, and relied on the deed as a *bonâ fide* transaction for valuable consideration.

The substance of the evidence is given in the judgment of Boyd, J.

A. F. Blood, for the assignees :—

At the date of the settlement of the 3rd December, 1896, and for some time before, the bankrupt was in an insolvent condition. This is indisputable upon the evidence. His sister Catherine who carried on the business of the licensed premises as manager, purchased goods, and kept accounts, must have known of the state of insolvency in which he then found himself. The premises charged by the deed constituted all the property he then had. The deed cannot be therefore sustained unless it is brought within some of the exceptions of the Act of 1872 (35 & 36 Vict. c. 58), s. 52. So far as that section protects settlements of a settlor's property in possession in consideration of marriage, it must be confined to settlements made on the marriage of the settlor himself, and cannot be construed as extending to the marriage of a collateral relative. The clause must be read as if the word "his" were inserted before "marriage." [BOYD, J.: Do you think that the section would not apply to the marriage of a daughter?] No; children are referred in subsequent branches of the section with respect to settlements of property acquired in right of the wife or of future acquired property, and even as regards settlements of after acquired property it is plain that the settlements dealt with are settlements made on the settlor's own marriage. The corresponding sections in England are the 91st sect. of the Act of 1869 (32 & 33 Vict. c. 71), and the 47th sect. of the Act of 1883 (46 & 47 Vict. c. 52). There does not appear to be any decision in either country limiting or extending the construction of these sections. A sister is merely a collateral relative; for the purposes of the

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question arising here she is in the same position as a stranger: *Smith* v. *Cherrill*(1). Malins, V.-C., says (p. 397): "I can only treat her" (the niece and adopted child of the settlor in that case) "in the same way as the collateral relatives, and there being no obligation to provide for them, I must take the whole limitations together, and consider them voluntary."

Even if this deed is to be treated as within the protection of the 52nd section, it is impeachable on the ground that Downes was in embarrassed circumstances at the time, to the knowledge of Mrs. King: *Bulmer* v. *Hunter* (2).

Ignatius O'Brien, for Patrick King:—

If the contention on the other side be sustained the section would not protect a settlement made on the marriage of a daughter of the settlor. The fallacy of the argument on behalf of the assignees is that it is based on the assumption that the consideration must be one moving to the bankrupt. The clause in the section on which the dischargeant relies is that which excepts from its operation any settlement of property "made in favour of a purchaser or incumbrancer in good faith and for valuable consideration." This instrument which has been miscalled a settlement, is a security for a marriage portion, and the marriage of Patrick King affords a valuable consideration *quoad* the bankrupt: *Shadwell* v. *Shadwell* (3). King insisted on getting this charge as a condition of the marriage. He believed that Downes was perfectly solvent. He is an incumbrancer in good faith. The covenant in the deed is to pay King.

Blood, in reply:—

In *Shadwell* v. *Shadwell* (3) there was no contest between creditors and the settlement. King cannot be looked on as an incumbrancer. The £100 was given as a fortune for Catherine.

(1) L. R. 4 Eq. 390. (2) L. R. 8 Eq. 46. (3) 9 Scott's C. B. 159.

BOYD, J.:—

The points argued in this case turn upon the construction of section 52 of the Bankruptcy (Ireland) Amendment Act, 1872.

It is not disputed that at the time of the execution of the indenture dated 3rd December, 1896, the bankrupt was in a state of hopeless insolvency and was unable to pay anything to his creditors, and that, except the licensed premises comprised in the said deed, he was possessed of nothing. His sister Catherine Downes managed the business for him, and I have no doubt was perfectly aware of his insolvency. It appears from the evidence of Patrick King, the dischargeant, that he knew the family of the bankrupt for some years, and that he became engaged to be married to Catherine Downes in July, 1896. After he was so engaged he had a conversation with her as to money she was likely to bring him, and she stated that her mother made her brother, the bankrupt, promise to give her a fortune. On 31st October, 1896, he called on the bankrupt and told him he was engaged to his sister, and asked him if he had any objection, and the bankrupt said "No." That he, King, then asked the bankrupt what settlement he would make in the event of their getting married, and he said he was not prepared to give an answer till he had consulted his brother; that he afterwards saw the bankrupt and his brother, and it was arranged that the bankrupt should give his promissory note for £100. The bankrupt told him he had no money, but it would be paid by instalments. It was stated that the bankrupt was then contemplating getting married, and that out of the fortune he would get he would pay the £100. Subsequently they went to Mr. Ryan, solicitor, who had prepared the assignment of the premises to the bankrupt, and consulted him, and as Mr. Ryan himself stated in his evidence, King asked him "were they solvent," and he stated "Yes." King then asked would he take the promissory note, and "I said as I was acting for all I would prefer a short deed of charge." The deed was then prepared by Mr. Ryan. It further appeared that in May, 1897, the bankrupt went to Mr. Ryan to consult him about his affairs, he having been served with a writ, and discussed his position with him. The result was that Mr. Ryan issued a circular to his creditors offering them a composition of 2*s.* 6*d.* in the £1, and therein stated that the debtor had no interest in the

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premises. Downes was adjudicated a bankrupt on 29th June, 1897.

It has been argued on behalf of the assignees, the chargeants, that the deed of 3rd December, 1896, is void under the provisions of the 52nd section of the Act of 1872—that it was not a settlement "in consideration of marriage" within the first exception in that section; that the exception only applies to the marriage of the trader himself. I agree with this contention. I think from the construction of the section this is plain. The section mentions (1) settlements in consideration of marriage; (2) settlements made after marriage, "on or for the wife or children of the settlor of property which has accrued to the settlor of the marriage in right of his wife"; and (3) covenants or contracts made by a trader "in consideration of marriage" for the future settlement "upon or for his wife or children" of his future acquired property. The whole scope of the section as to marriage settlements appears to me to contemplate only the marriage of the trader; and I think in construing the section the word "his" should be inserted, and the sentences "in consideration of marriage" mean "in consideration of his marriage." I therefore think the deed in question in this case does not come within the first exception in the section.

It has been argued by the dischargeant that if it does not come within the first exception, it is preserved by the second, viz. a settlement "made in favour of a purchaser or incumbrancer in good faith and for valuable consideration."

It is contended that marriage is "valuable consideration," and so no doubt it is in most cases, but the section mentions "purchaser or incumbrancer" for such consideration. This I think only applies to purchaser or incumbrancer in a "commercial sense" and not a "legal sense": see *Ex parte Hillman, In re Pumfrey* (1). In all the cases decided after this case, though some may qualify to some extent the judgment of Jessel, M.R., they all base the decision upon the fact that valuable consideration in money passed between the parties: see *Hance* v. *Harding* (2); *Mackintosh* v. *Pogose* (3). Another matter should, I think, be taken

(1) 10 Ch. D. 622. (2) 20 Q. B. D. 732. (3) [1895] 1 Ch. 505.

into consideration in this case, that there was no obligation upon the bankrupt to make any provision for his sister, and his settlement upon her could not prevail against creditors: *Smith* v. *Cherrill* (1). The alleged promise to his mother was vague and undefined, and imposed no legal obligation upon him to do so: see *M'Askie* v. *M'Cay* (2), and several other cases to the like effect. Besides, in this case it is admitted that the marriage between King and the bankrupt's sister had been arranged and agreed on long prior to any thought of any money consideration.

I have had the advantage of seeing and hearing the witnesses, and must say I was not favourably impressed by them. The bankrupt and his sister, though she was not examined, undoubtedly knew of the embarrassed condition of their affairs, and King, admittedly, had grave suspicions as to the solvency of the bankrupt, for he asked Mr. Ryan "were they solvent?" From the manner, demeanour, and evidence of the witnesses, including Mr. Ryan, I believe, they all knew of the bankrupt's financial condition. If he was solvent, why did Mr. Ryan require a charge? He was not the solicitor for all parties; he had been and was the solicitor for the bankrupt, and he suggested the mortgage—for what purpose? I believe it was to remove the property from the reach of his creditors, and that even if King were a purchaser or incumbrancer for valuable consideration, he was not such in "good faith" as required by section 52 to validate the transaction.

I find in favour of the assignees with costs.

Solicitors for the assignees: *Bennett Thompson & Mac Laughlin.*
Solicitor for Patrick King: *P. Ryan.*

W. G.

(1) L. R. 4 Eq. 390. (2) Ir. R. 2 Eq. 447.

Appeal. 1897.

Feb. 16.
March 1.

DUNNE, Tenant; KNOLLES and BABINGTON (Trustees of NETTLES), Landlords (1).

Landlord and tenant—Land Acts, 1881 *and* 1887—*Fair rent—Agreement and declaration—Filing—Commencement of statutory term—Application to fix judicial rent for second statutory term—Time for application*—44 & 45 *Vict. c.* 49, *s.* 8 (6), (8); *s.* 20, *proviso* (2)—*Questions to be decided on special case.*

By an agreement and declaration, dated 30th March, 1882, the landlord and tenant fixed what was then the fair rent of the holding, agreeing that the first payment in respect of such rent which was payable half-yearly was to be made on the 1st May then next. The said agreement and declaration was lodged with the Clerk of the Peace on the 5th April, 1882, and, at the expiration of three months from that date, was duly filed. On the 2nd July, 1896, the tenant served an originating notice, seeking to fix the fair rent of the holding for the second statutory term:—

Held (reversing the decision of the Land Commission—[1896] 2 I. R. 671), that the application of the tenant was not premature, as the first statutory term was current pursuant to the terms of the agreement on 1st May, 1882.

The Court of Appeal declined to decide whether the first statutory term began to run upon 1st November, 1881, or upon 1st May, 1882, the decision of this question being immaterial to the rights of the parties in this case.

Case stated by the Irish Land Commission for the consideration and decision of Her Majesty's Court of Appeal.

1. "The tenant on the 2nd July, 1896, served an originating notice of an application to the Land Commission for an order fixing a fair rent payable for his holding for the second statutory term. The fair rent for the first statutory term had been fixed by an agreement and declaration entered into between the landlord and the tenant pursuant to section 8, sub-sect. 6, of the Land Law (Ireland) Act, 1881. The said agreement and declaration bears date the 30th March, 1882, and the material parts of it were as follows:—'We hereby agree and declare that £69 9*s.* 8*d.* is now the fair rent of the above holding, and we apply to the County

(1) Before Lord Ashbourne, C., and Fitz Gibbon and Walker, L.JJ.

Court to file this agreement, to the intent that the said rent of £69 9*s.* 8*d.* may be the judicial rent of the holding, to be payable half yearly on every 1st May and 1st November, the first payment to be made on the 1st May next.' The said agreement and declaration was lodged in the office of the Clerk of the Peace of the East Riding of the county of Cork, on the 5th April, 1882, and for the purposes of this case it is to be taken that it was duly filed in the Civil Bill Court, at the expiration of three months from that date. It appears from the said agreement and declaration that the judicial rent fixed by it was the same as the previous existing rent of the holding.

2. "If the statutory term consequent upon the fixing of a judicial rent by the filing of the said agreement and declaration commenced as from the 1st May, 1882 (the rent day next following the date of the said agreement and declaration), fourteen years of the said statutory term would have expired on the 1st May, 1896, and the tenant would have been entitled to serve the said originating notice to have a fair rent fixed for a second statutory term. If, on the other hand, the said statutory term only commenced as from the rent day next succeeding the filing of the said agreement and declaration, the said statutory term would have commenced as from the 1st November, 1882, and fourteen years thereof not having expired until the 1st November, 1896, the tenant would not have been entitled to serve the said originating notice until after the latter date.

3. "It was argued for the landlord that the first statutory term ran from the 1st November, 1882, and that consequently the said originating notice was premature and the Land Commission had no jurisdiction to make any order upon the application.

4. "It was argued upon behalf of the tenant that though an agreement and declaration under the said enactment required to be filed in order to become operative, when filed, it operated from the date of its execution. It was also argued that even if this was not so, as a general rule, the express provisions of the agreement and declaration in this particular case caused the judicial rent and statutory term to run as from the gale day next succeeding the execution of the agreement and declaration.

5. "We were of opinion, where a fair rent was fixed for the first

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statutory term by an agreement and declaration entered into under section 8, sub-sect. 6, of the Land Law (Ireland) Act, 1881, and subsequently duly filed in Court, the statutory term commenced from the rent day next succeeding the filing and not the making of the agreement: that the special provisions of the agreement of the 30th March, 1882, did not alter the date of the commencement of the statutory term, which in our opinion ran as from the 1st November, 1882, and consequently the said originating notice to fix a fair rent for a second statutory term was premature and should be dismissed. At the request of counsel for the tenant we agreed to state this case for the consideration and decision of Her Majesty's Court of Appeal in Ireland.

"The questions for such consideration and decision are:—

1. "Whether, where the fair rent of a holding held under a present tenancy has been fixed for the first statutory term by an agreement and declaration executed pursuant to section 8, sub-sect. 6, of the Land Law (Ireland) Act, 1881, and duly filed in Court, the statutory term commences from the rent day next succeeding the filing, and not the making, of such agreement and declaration.

2. "Whether, assuming that the statutory term in such case would commence from the rent day next succeeding the filing of the agreement and declaration, where such agreement and declaration contains no provision as to the date at which the fair rent shall become payable or the statutory term shall commence, the effect of the special provisions in the agreement and declaration of the 30th of March, 1882, was to cause the statutory term to run from the rent day next succeeding the execution of the agreement and declaration.

"HUGH POLLOCK, A. R."

The case is reported in the Court below [1896] 2 I. R. 671.

T. M. Healy, for the tenant, cited *Church* v. *M'Poyle* (1); *Davies* v. *M'Mahon* (2); *Conyngham* v. *Gallagher* (3); *Law* v. *Sinnamon* (4).

(1) 22 Ir. L. T. R. 85.
(2) 24 L. R. Ir. 73, 447.
(3) 22 L. R. Ir. 614.
(4) 24 Ir. L. T. R. 9.

P. D. Fleming, for the landlord.

Cur. ad. vult.

LORD ASHBOURNE, C.:—

This is an appeal from the decision of the Land Commission. It has been argued before us upon a case stated, from which it appears that the tenant, on the 2nd day of July, 1896, served an originating notice of an application to the Land Commission for an order fixing a fair rent, payable for his holding for the second statutory term. The fair rent for the first statutory term had been fixed by an agreement and declaration entered into between the landlord and the tenant pursuant to section 8, sub-section 6, of the Land Law (Ireland) Act, 1881. The said agreement and declaration bears date the 30th day of March, 1882, and the material parts of it were as follows:—"We hereby agree and declare that £69 9*s.* 8*d.* is now the fair rent of the above holding, and we apply to the County Court to file this agreement, to the intent that the said rent of £69 9*s.* 8*d.* may be the judicial rent of the holding, to be payable half-yearly on every 1st day of May and 1st day of November, the first payment to be made on the 1st day of May next." The said agreement and declaration was lodged in the office of the Clerk of the Peace for the East Riding of the county of Cork on the 5th day of April, 1882, and for the purposes of this case it is to be taken that it was duly filed in the Civil Bill Court at the expiration of three months from that date. It appears from the agreement and declaration that the judicial rent fixed by it was the same as the previous existing rent of the holding.

The point argued before the Land Commission was a narrow one: the landlord (as it is stated in the case) contending that the first statutory term ran from the 1st day of November, 1882, and that consequently the originating notice was premature, and the Land Commission had no jurisdiction to make any order upon the application. It was argued on behalf of the tenant that, though an agreement and declaration under the Act required to be filed in order to become operative, when filed, it operated from the date of its execution. It was also argued, that even if this was not so as a general rule, the express provisions of the agree-

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ment and declaration in this particular case caused the statutory term to be current on the gale day next succeeding the execution of the agreement and declaration.

The Land Commission took time to consider the question so raised, and their decision, which was announced by Mr. Justice Bewley in a careful and elaborate judgment (1), is thus summarized in the case stated:—"We were of opinion, where a fair rent was fixed for the first statutory term by an agreement and declaration entered into under section 8, sub-section 6, of the Land Law (Ireland) Act, 1881, and subsequently duly filed in Court, the statutory term commenced from the rent day next succeeding the filing, and not the making of the agreement: that the special provisions of the agreement of the 30th day of March, 1882, did not alter the date of the commencement of the statutory term, which in our opinion ran as from the 1st day of November, 1882, and that consequently the said originating notice to fix a fair rent for a second statutory term was premature and should be dismissed." At the request of the tenant, who was dissatisfied with this decision, the Land Commission have stated two questions for the consideration of the Court of Appeal: "(1) Whether, where the fair rent of a holding held under a present tenancy has been fixed for the first statutory term by an agreement and declaration executed pursuant to section 8, sub-section 6, of the Land Law (Ireland) Act, 1881, and duly filed in Court, the statutory term commences from the rent day next succeeding the filing, and not the making of such agreement and declaration?" and "(2) Whether—assuming that the statutory term in such case would commence from the rent day next succeeding the filing of the agreement and declaration, where such agreement and declaration contains no provision as to the date at which the fair rent shall become payable, or the statutory term shall commence—the effect of the special provision in the agreement and declaration of the 30th March, 1882, was to cause the statutory term to run from the rent day next succeeding the execution of the agreement and declaration?"

It is material to note, apart from the principal sub-section upon the wording of which this case must, I think, be determined, what

(1) [1896] 2 Ir. R. 671.

is the *terminus* from which, in other parts of the Act, a judicial term is made to run. By section 4, "where the landlord demands an increase of rent from the tenant of a present tenancy . . . or demands an increase of rent from the tenant of a future tenancy beyond the amount fixed at the beginning of such tenancy, then, where the tenant accepts such increase, until the expiration of a term of fifteen years from the time when such increase was made (in this Act referred to as a statutory term) such tenancy . . shall be deemed to be a tenancy subject to statutory conditions." Under the circumstances mentioned in this section, without any agreement other than is to be implied from the demand and acceptance of an increased rent, without any adjudication, without any filing in Court, the statutory term runs "from the time when such increase" in the rent "was made." Then, by section 8, subsects. 2 and 3, it is provided that, where the fair rent of a holding is fixed by the Court (under sub-sect. 1), the judicial rent "shall be deemed to be the rent payable by the tenant as from the period commencing at the rent day next succeeding the decision of the Court," and the statutory term is to run "from the rent day next succeeding the day on which the determination of the Court has been given." In cases under this section, therefore, the *terminus* from which the statutory term is to run is fixed by the judicial act. Again, under section 20, sub-sect. 2, it is provided that where a landlord having resumed possession of a tenancy from a present tenant reinstates his tenant as such, the tenancy is again to become subject to all the provisions applicable to present tenancies, "provided always that the landlord and tenant may, at the time of such reinstatement, agree on the rent to be paid by such tenant, and in such case such agreement shall have the same effect as if the rent so agreed on were a judicial rent fixed by the Court." Thus, in the case of a reinstatement under this section, we have an instance of a *terminus* from which a statutory term is made to run being fixed by agreement between the parties themselves, without apparently any filing in Court or any writing. It is obvious, therefore, that there is no hard and fast line given by the statute by which in all cases alike the commencement of the statutory term is to be ascertained.

I now approach the consideration of section 8, sub-sect. 6.

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Lord Ashbourne, C.

"Subject to rules made under this Act, the landlord and tenant of any present tenancy to which this Act applies may at any time, if such tenancy is not subject to a statutory term, or if the tenancy is subject to a statutory term, then may, during the last twelve months of such term, by writing under their hands, agree and declare what is then the fair rent of the holding: and such agreement and declaration on being filed in Court, in the prescribed manner, shall have the same effect and consequences in all respects as if the rent so agreed on were a judicial rent fixed by the Court under the provisions of this Act." Several cases were cited during the argument, but I refer to the one which appears most to touch the point which we have to decide, the decision of the Lord Chief Baron in *Church* v. *M'Poyle* (1). Mr. Justice Bewley thought this case decided only what was the period at which a judicial rent was to be considered as having been fixed for the purposes of adjustment under section 29 of the Act of 1887, and he accordingly put it aside as being not germane to the question we have to decide. But the judgment of the Lord Chief Baron turns upon the very words of section 8, sub-sect. 6, which we have to construe. He says:—"The question to be decided in this case is the effect of an agreement under section 8, sub-sect. 6, of 44 & 45 Vict. c. 49, fixing a fair rent, when the agreement was executed in 1885, but not filed till 1886. If the rent is to be taken as fixed, within the meaning of the 29th section of the Act of 1887, in 1886, when this agreement was filed, the tenant is not entitled to any reduction in his rent under that section, for the section directs an abatement to be made only 'according as such judicial rents were fixed in one or other of the years before the first of January, one thousand eight hundred and eighty-six, respectively.' But I am of opinion, that this is not the proper construction of section 8, sub-sect. 6. When the parties execute the agreement they decide the amount of the rent, having regard to the prices current at the time the agreement is entered into, and not with regard to what prices may be when the agreement comes to be filed. The rent is ascertained by the agreement of the parties; it is fixed when the agreement is entered into; and although the filing of the agreement is a condition which

(1) 22 I. L. T. R. 85.

must be fulfilled before the rent becomes a judicial rent, the rent is not fixed when the agreement is filed." That is plainly a decision upon section 8, sub-sect. 6, of the Act of 1881, as well as upon section 29 of the Act of 1887, and it shows that, in the opinion of the Lord Chief Baron, the governing date in giving effect to such agreements and declarations is the date of the making of the agreement and not the date of the filing in Court.

Supposing the words "on being filed in Court in the prescribed manner" were not in the sub-section we have to construe, no one could doubt that the statutory term would run from the date fixed by the agreement. Of course, we have to construe the sub-section giving effect to these words. But they must be taken not alone, but in connection with the other provisions enacted. The parties may "by writing under their hands, agree and declare what is *then* the fair rent of the holding; and such agreement and declaration on being filed in Court in the prescribed manner, shall have the same effect and consequences in all respects as if the rent *so agreed on* were a judicial rent fixed by the Court." In my opinion, that means that the agreement and declaration on being filed is to relate back. Therefore, I think, in the present case that the commencement of the judicial rent and of the statutory term is that which was in the mind of the parties when they signed the agreement, and that the first gale day for the payment of the judicial rent was the first day of May next after the making of the agreement. But I desire to add that I decide nothing outside the facts of this case, which I think show that the application of the tenant was not premature—which is the answer we will, in substance, give to the first question. We do not think that, under the circumstances, we are called upon to answer the second question.

FITZ GIBBON, L.J.:—

It is enough to decide this case in favour of the tenant that we are all of opinion that the statutory term was current on the gale day next succeeding the making of the agreement of March 30, 1882, namely, on May 1, 1882. I am entirely satisfied that the term must run from the gale day next succeeding the making of the agreement, as distinguished from that next succeeding the

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filing; but, having regard to the terms of the agreement here, I think, as at present advised, that both the fair rent agreed on and the statutory term, in this particular case, began on November 1, 1881.

The questions at foot of the case are put in general terms, and one of them assumes a state of facts at variance with the agreement proved. I hold that we have no jurisdiction to answer hypothetical questions which may concern parties, and may depend on facts or documents, not before us.

In my opinion, the normal effect of the Land Law (Ireland) Act, 1881, sect. 8, sub-sect. (6), is to turn the rent *agreed upon as the fair rent* into a judicial rent, and this conversion is regulated in each case, within legal limits, by the terms of the agreement between the parties.

The periods of the judicial rent and of the statutory term during which it runs must, in my opinion, be conterminous. When it is part of the contract that the rent agreed on shall be a judicial rent, there can be no gap; the operation of the agreement upon the rent, and the commencement of the judicial rent, must be contemporaneous, and, in accordance with the agreement, the whole period for which that rent runs must be included in the statutory term, otherwise there would be a period during which a rent would be payable, which would be neither the old rent nor a judicial rent. The decisive question—When did the fair rent agreed on commence?—must be decided by the agreement. In this case the agreement is express on that point.

The agreement of March 30, 1882, made during the currency of the gale ending May 1, 1882, expressly provides that the first gale of the fair rent agreed on is to be payable on May 1, 1882; therefore the rent and term run from November 1, 1881. The agreement was expressly intended to be filed in due course, and it was lodged with the Clerk of the Peace during the currency of the same gale. In other words, the parties expressly agreed that the rent of that gale should be a judicial rent, and that the period of that gale should be included in the statutory term. They did this before the rent had become payable, and the agreement legally affected the rent accruing for that gale. Treated as a demise, the term began to run from November 1, 1881. The

agreement became operative in due course, and any delay in giving judicial effect to it arose from the exigencies of procedure, and could not affect its operation. It operated, as most demises and lettings do, upon the whole gale of rent current at its date, and that rent became judicial—*i. e.* received judicial sanction by relation back—when the agreement was filed.

But even if we give to the *making* of the agreement the same effect as the judicial fixing of a fair rent, the next succeeding gale day would be May 1, 1882; and the decision of the Land Commission, that the tenant's originating notice was premature, would still be unsustainable. Though I think that the term began to run on November 1, 1881, I reserve liberty to reconsider that question in any future case, because the special case does not reserve that question, it was not argued, and it has become immaterial to our decision.

The second question on the Special Case rests on the assumption of an agreement and declaration containing no provision as to the date at which the fair rent shall become payable, or the statutory term shall commence, and this assumption is inapplicable to the case before us. It is also, in my opinion, an assumption which is insufficient to enable any one to answer the question. The hypothesis is incomplete, and leaves the materials necessary for a decision uncertain. If an agreement contains no express provision as to when the rent agreed on first becomes payable, it may be a question of construction, to be answered on the whole agreement, when the rent is to become judicial, and when the statutory term is to commence, and the very silence of the parties may suggest that the agreement is not intended to affect the rent until it has become judicially and finally operative by filing. In such a case, there might even be a presumption that the rent agreed on, in analogy to a rent judicially fixed, should run from the next succeeding gale day. Different phraseology might lead to different conclusions; the very dates might be material, as to the effect of an agreement which was silent as to the commencement of the rent.

But even if the agreement purported to fix the commencement of the rent payable under it, I cannot decide now, in the absence of parties interested, and on a hypothetical case, that the judicial rent

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and the statutory term must necessarily run from the date so fixed. For instance, I cannot now decide that rent which had accrued due before the making of the agreement, or which had been recovered by judgment, or which had even been voluntarily paid after the making but before the filing of the agreement, can, *ex post facto*, be turned into judicial rent, with the effect of antedating the beginning of a statutory term, and putting it back to a period for which the Land Commission could not have fixed a fair rent. Questions such as these must be definitely raised before they are decided, and I therefore strictly confine my judgment now to the case of *Dunne, Tenant; Trustees of Nettles, Landlords.*

WALKER, L.J.:—

On March 30, 1882, the landlord and tenant, in the words of section 8, sub-section 6, of the Act of 1881, agreed and declared that £69 9*s.* 8*d.* was then, *i. e.* on the same day, the fair rent of the holding, and they applied to the County Court to file the agreement, to the intent that it might be the judicial rent, the first gale of it to be payable on May 1, 1882. It is obvious that, so far as agreement could lawfully do it, the parties fixed May 1, 1882, as the date of the first payment of the judicial rent.

The Act of 1896 (sect. 17) gives a new and extended operation to agreements, and so when the rent is fixed by the Court, the same Act and the Act of 1887 give an earlier start by relation to the judicial rent, but I think the question in this case entirely depends on the true construction of the Act of 1881 alone.

Of the several modes mentioned in the Act of 1881 by which rent may be adjusted and a statutory term created, the two first expressly fix the period from which it shall commence, and the second—namely, where the Court determines the amount—makes the statutory term and judicial rent run from the rent day succeeding the decision of the Court. The third mode is when the parties "by writing under their hands agree and declare what is then the fair rent." The rules contain special provisions for making this agreement a genuine and solemn one, and the fair rent is thus fixed; but the manner in which the character of a judicial rent with all its consequences—including the existence of

the statutory term—is attached to it, is determined by the words "and such agreement and declaration on being filed in Court in the prescribed manner shall have the same effect and consequences in all respects as if the rent so agreed on were a judicial rent fixed by the Court."

There is no doubt that on the filing of the agreement the fair rent fixed by the agreement becomes a judicial rent with the incidents of such; but the question is from what date, so far as regards the creation of the statutory term. Mr. Justice Bewley states his view in the following passage of his judgment:—"Neither statutory term nor judicial rent can come into existence before the date of the filing, and there is nothing in the Act to antedate the commencement of the statutory term." The effect of the filing is only stated by reference, and the question is what is the true construction of the sub-section, and it is on that point I differ from the learned Judge.

The lodgment with the Clerk of the Peace and expiration before filing of a period of three months are merely convenient machinery prescribed by rules for the purpose of giving notice. When the period elapses, and no objection has been received, the clerk in the office files the agreement; and what is then clothed with the judicial character, after procedure has run its course, is "such agreement and declaration"; and the section goes on "as if the rent so agreed on," *i. e.* the agreed fair rent, "were a judicial rent fixed by the Court." It had been before and from the first the agreed fair rent, but it now has by reference the further character of being "judicial," as a rent fixed by the Court would be judicial. That character is, I think, attached to the fair rent to the like extent and from the same period as it would attach to a rent fixed by the Court. Such, in my opinion, is the true construction of the sub-section.

There would be great inconvenience in holding that the fair rent and judicial rent are not conterminous, once the filing has taken place. One gale would be fair rent, and yet not judicial rent—a consequence impossible when the rent is fixed by the Court.

It is in my opinion a serious question whether the effect of the section is upon the filing to make the agreement itself a fixing of the fair rent as if by the Court on the date of the agreement,

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in which case the rent and statutory term began from the 1st May, 1882, or to make the rents fixed by the agreement judicial, according to the terms of the agreement, *i. e.* to make it run from the 1st November, 1881, thus operating on the rent current when the agreement was signed. This question was not argued before us, and it was unnecessary for counsel for the tenant to put the case so high. I think it better to reserve my opinion upon this question until it distinctly arises and has been argued. In either view the notice served by the tenant in the present case was not premature. We have not to consider a case where the agreement provides that the fair rent shall begin in actual payment on a gale day before the date of the agreement; nor have we to decide what the rights of the landlord would be if a gale of rent accrued before the filing, and was sued for before the filing. The 17th section of the Act of 1896 may perhaps meet such cases in future. We have only to consider the effect of the filing by relation on the fair rent agreement for the purpose of fixing the commencement of the statutory term, which is, I think, in this case, not later at all events than the 1st May, 1882, and that is sufficient for the determination of the rights of the litigants before us.

The curial part of the order of the Court of Appeal is as follows:—

> "UPON the facts and documents stated in the case, the first statutory term in the holding mentioned therein, under the agreement and declaration dated the 30th day of March, 1882, was current, pursuant to the terms of the said agreement, on the 1st day of May, 1882, being the gale day upon which the first half-yearly payment of the rent agreed upon became due and payable, and consequently the tenant's originating notice, served on the 2nd day of July, 1896, to fix a fair rent for a second statutory term was not premature, and should not have been dismissed. Having regard to the foregoing answer to the first question, the Court doth not think it necessary or expedient to answer the second question upon the special case, nor to decide whether the statutory term aforesaid began to run upon the 1st day of November, 1881, or upon the 1st day of May, 1882, such answer or decision being immaterial to the rights of the parties in this case, and the question as to the 1st day of November, 1881, not having been raised upon the special case."

Solicitor for the tenant: *M. Healy.*
Solicitor for the landlords: *R. Ashe.*

G. Y. D.

FULTON AND OTHERS, TENANTS; VISCOUNT TEMPLETOWN, LANDLORD (1).

Appeal. 1898.

Jan. 20. Feb. 15.

Landlord and tenant—Land Acts, 1881 *and* 1887—*Agreement and declaration fixing fair rent—Statutory term—Commencement of—Land Law (Ireland) Act,* 1881, *section* 8, *sub-section* 6.

By an agreement and declaration, dated 7th January, 1883, and subsequently duly filed, the landlord and tenant of a holding subject to a present tenancy fixed the judicial rent of the holding, and the agreement declared that the judicial rent and term were to commence as from the 1st November, 1881. On the 29th October, 1896, the tenant served an originating notice to fix the fair rent for a second statutory term:—

Held, by the Court of Appeal, reversing the decision of the Land Commission, that the originating notice was not premature.

When a rent is agreed on, under section 8, sub-section 6, of the Land Law (Ireland) Act, 1881, its conversion into a judicial rent is regulated in each case within legal limits by the agreement between the parties.

Whenever a rent fixed by agreement acquires the character of a judicial rent, that rent must be conterminous with the statutory term during which it runs.

There was nothing illegal in an agreement made by the landlord and the tenant in 1883, that the judicial rent and statutory term should begin as from the 1st November, 1881.

CASE STATED by the Irish Land Commission for the consideration and decision of Her Majesty's Court of Appeal in Ireland. The case stated was as follows:—

1. After the passing of the Land Law (Ireland) Act, 1881, each of the above-named tenants entered into an agreement and declaration in writing with the landlord fixing the fair rent of his or her holding, and the said agreements were duly filed in the Land Commission pursuant to the provisions of sect. 8, sub-sect. 6 of the said Act.

2. The dates on which the said agreements were respectively

(1) Before LORD ASHBOURNE, C., and FITZ GIBBON, WALKER, and HOLMES, L. JJ.

Appeal. 1898. FULTON, *Tenant;* TEMPLETOWN *Landlord.*

made and filed are set out in the schedule hereto, and the gale days on which the rent in each case was payable was the 1st day of May and the 1st day of November.

3. Each of the said agreements was made and filed after the 1st November, 1881, the earliest in date having been signed on the 21st December, 1882, and the latest on the 19th October, 1883; but each agreement contained the following provision:— It is also agreed that the judicial rent and term shall commence as from 1st November, 1881.

4. We beg to refer to the agreement and declaration in the case of William S. Fulton, tenant; all the other agreements were in the same form, *mutatis mutandis.*

5. On 29th October, 1896, the thirteen tenants first mentioned in the title hereof served originating notices of application to the Land Commission to have a fair rent fixed for a second statutory term, and on the 30th October, 1896, John M'Bride, John Allen, Alexander and James Gault, William Gault, Mary Bell, Alexander Mawhinney, seven of the tenants mentioned in the title hereof served similar notices; and on the 28th October, 1896, the other three tenants, namely, William J. Moore, Thomas Walker, and James Wall, served similar notices.

6. A question having arisen as to whether the said originating notices were premature, the cases were listed for argument before us on 11th June, 1897; and it was contended on behalf of the tenants that the first statutory term in each year ran from the 1st November, 1881, and the applications to have a fair rent fixed were not premature.

7. Counsel appeared on behalf of the landlord, and stated that in any case in which an agreement provided for the date at which the statutory term was to begin the landlord would not object to its being taken as beginning at that date; but we were of opinion that, if the 14th year of the first statutory term had not expired when such originating notices had been served, no consent on the part of the landlord unless evidenced in the manner provided by sect. 17 of the Land Law (Ireland) Act, 1896, and the rules made thereunder, could give the Land Commission jurisdiction to entertain an application to fix a fair rent.

8. If the first statutory term should be held to run from 1st

November, 1881, the originating notices to fix fair rents for a second statutory term were not premature; but if the first statutory terms should be held to run from the gale day next after the dates of the respective agreements, the originating notices to fix a fair rent for a second statutory term were premature.

9. We were of opinion that although there was no legal objection to a landlord accepting rent from an antecedent date at the rate of the judicial rent, the landlord and tenant could not by agreement make the tenancy subject to statutory conditions, nor create a statutory term, from a date prior to the date of the execution of the agreement and declaration, and that what they purported to do was virtually to create statutory terms of 14, 13, and 12 years' duration or thereabouts, and that this was inconsistent with sub-section 7, and the other provisions of sect. 8 of the Land Law (Ireland) Act, 1881; but at the request of counsel for the tenants we agreed to state this case for the consideration and decision of Her Majesty's Court of Appeal in Ireland.

The questions for such consideration and decision are:—

1. Whether on the facts stated the said originating notices of application to fix fair rents for a second statutory term were served in each case prior to the expiration of the 14th year of the first statutory term?

2. Whether it was competent for the Land Commission to make an alteration in the judicial rent that would take place at a less interval than 15 years from the date at which the agreement and declaration fixing the judicial rent for the first statutory term was entered into.

[Here followed the schedule.]

R. Todd, for the tenants.

There was no appearance for the landlord.

Cur. adv. vult.

Feb. 15.

LORD ASHBOURNE, C.:—

This appeal comes before us on a case stated by the Land Commission. It is interesting from the fact that the landlord and the several tenants are in thorough accord as to the nature and effect of the several agreements into which they have entered, and

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the reason why the originating notices have been dismissed is not owing to any point raised by the landlord, but because the Land Commission were of opinion that each of the agreements contained a provision to which effect could not be given on the ground that it was contrary to law.

It appears that after the passing of the Land Law (Ireland) Act, 1881, each of the tenants, who are the appellants here, entered into an agreement and declaration in writing with the landlord fixing the fair rent of his holding, and these agreements were duly filed.

Each of the agreements was made and filed after 1st November, 1881, the earliest in date having been signed on 21st December, 1882, and the latest on 19th October, 1883, and each contained the following provision :—"It is also agreed that the judicial rent and term shall commence as from 1st November, 1881."

On different days towards the end of the month of October, 1886, each of the appellants served originating notices of application to have fair rents fixed for a second statutory term. The question was then raised whether these originating notices were premature, and the several cases were listed for argument before the Land Commission on 11th June, 1887, when it was contended on behalf of the tenants that the first statutory term in each case ran from 1st November, 1881, and that therefore the applications were not premature. Counsel for the landlord also attended at the argument and stated that the attitude taken up by his client was that he had entered into an agreement, that he was honourably desirous of observing it, and, accordingly, as the agreements provided for the date at which the statutory term was to begin, he would not object to its being taken as beginning at that date. The Land Commission, however, were of opinion that if the fourteenth year of the first statutory term dating from the agreement had not expired when the originating notices had been served, no consent on the part of the landlord, unless evidenced in the manner provided by sect. 17 of the Land Law (Ireland) Acts 1896, and the rules made thereunder, could give jurisdiction to the Land Commission to entertain an application to fix a fair rent.

Having detailed the foregoing facts, the case stated proceeds :—

"If the first statutory term should be held to run from 1st November, 1881, the originating notices to fix fair rents for a second statutory term were not premature; but if the first statutory term should be held to run from the gale day next after the respective agreements the originating notices to fix a fair rent for a second statutory term were premature. We were of opinion that, although there was no legal objection to a landlord accepting rent from an antecedent date at the rate of the judicial rent, the landlord and tenant could not by agreement make the tenancy subject to statutory conditions, nor create a statutory term, from a date prior to the date of the execution of the agreement and declaration, and that what they purported to do was virtually to create statutory terms of 14, 13, or 12 years' duration or thereabouts, and that this was inconsistent with sub-sect. 7 and the other provisions of sect. 8 of the Land Law (Ireland) Act, 1881, but at the request of counsel for the tenants we agreed to state this case for the consideration and decision of Her Majesty's Court of Appeal in Ireland. The questions for such consideration and decision are:—1, Whether on the facts stated the said originating notices of application to fix fair rents for a second statutory term were served in each case prior to the expiration of the fourteenth year of the first statutory term. 2, Whether it was competent for the Land Commission to make an alteration in the judicial rent that would take place at a less interval than fifteen years from the date at which the agreement and declaration fixing the judicial rent for the first statutory term was entered into."

Now it is manifest that if it was competent for the parties to enter into these agreements, the originating notices are not premature. The Land Commission have in effect held that it was not lawful for the landlord and tenants to agree, as they have done here, that the judicial rent and statutory term should run from a date prior to the making of the agreement and declaration, and that the agreement of landlord and tenant cannot give them jurisdiction to entertain these originating notices.

I have already pointed out in *Dunne, Tenant; Knolles and Babington, Landlords* (1) that the Land Law (Ireland) Act, 1881,

(1) *Ante*, p. 308.

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lays down no hard-and-fast line by which in all cases the commencement of the statutory term is to be ascertained; the fair rent may be fixed by judicial determination, in which case the term runs from the rent day next succeeding the decision of the Court; or the fair rent may be fixed by agreement, and then the period from which the statutory term is to run may depend upon the provisions of the agreement. In *Dunne* v. *Knolles* (1) the landlord and tenant signed an agreement and declaration fixing the fair rent on 30th March, 1882, which was duly filed within three months from that date. The agreement provided that the first payment of the judicial rent was to be made on the 1st May following the date of the agreement. The tenant served an originating notice to fix the fair rent for a second statutory term on 2nd July, 1896. The Land Commission held that the date of the filing of the agreement and not of its execution was the governing date, and that the statutory term ran from the rent day next succeeding the filing, which was in that case 1st November, 1882, and that consequently the originating notice served on 2nd July, 1896, was premature.

The Court of Appeal, however, took a much broader view; we held that the date of the execution of the agreement and not the date of its being filed was the governing date, and that the first payment of the judicial rent having been by the agreement fixed to be made on the 1st May, 1882, the statutory term was on that day current; and that therefore the originating notice served in that case was not premature. But we left open the question, which was not then necessary to decide, as to whether the statutory term began to run prior to the agreement upon the 1st November, 1881, or not. That is, we decided that the judicial rent ran from 1st November, 1881, but we left undecided the date at which the judicial term commenced. Still the decision of this Court in *Dunne* v. *Knolles* (1) went very much in the direction of the argument addressed to us on behalf of the appellants here: for it gave great weight to the agreement of the parties as to the date from which the fair rent was to run.

This case presents the net question in a clear form as to

(1) *Ante*, p. 308.

whether the statutory term can be made relate back to the 1st November, 1881, by an agreement entered into subsequently to that date.

Is there anything illegal under the code constituted by the Land Law (Ireland) Acts in saying that the statutory term and the fair rent must have the same starting point under an agreement? Is there anything in the agreement made here illegal? Is the proviso in the agreement that the rent and the term are both to start from November, 1881, illegal? It is hard to see what principle of public policy is involved. Admittedly the fair rent can be made run from that date. Why should not the term run for fifteen years from it? This is a question of an agreement by which both parties desire to be bound, and its operation can be prevented only by some most imperious rule of law. I know of none such, and am unable to see any reason for it. I can find nothing in the Act, which expressly sanctions agreements as to fair rents, to forbid the parties making the term of fifteen years start along with the judicial rent from a *terminus* earlier than the date of the agreement.

The questions asked by the special case must be answered accordingly.

FITZ GIBBON, L. J. :—

Two principles were laid down by this Court in *Dunne* v. *Knolles* (1) which appear to me to lead to our conclusion in this case, although we then reserved a decision upon the question now submitted, because it did not then arise, and it had not been argued by parties interested in its determination. These principles are first, that when a rent is agreed on under the Act of 1881, sect. 8 (6), its conversion into a judicial rent is regulated, in each case, within legal limits, by the terms of the agreement between the parties; and, secondly, that whenever a judicial rent has been fixed by the Court, or when fixed by agreement acquires the character of a judicial rent, that rent must be conterminous with a statutory term during which it runs.

It would have been within the jurisdiction of the Court, in

(1) *Ante*, p. 308.

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the case before us, to fix a fair rent for a statutory term commencing on November 1, 1881, if application had been made on the first occasion on which the Court sat after the passing of the Act. Such a rent being legally possible, I see no reason to prevent the parties from agreeing to create it, and then making it a judicial rent under section 8 (6). This was their expressed object and declared intention. The period of the commencement of the rent was an essential term of the agreement, and so was the stipulation that the rent agreed on should have all the incidents of a judicial rent. If we were to hold that such an agreement was inoperative, and that the commencement of the judicial rent, and the commencement of the necessarily conterminous statutory term, must be postponed from November 1, 1881, until the gale day next after the making of the agreement, we should at once raise the difficulty that the rent, during the period of the postponement, would not be a judicial rent, although the agreement expressly stipulated that it should be so; and, at the other end of the transaction, we should raise the further difficulty that, for a corresponding period after the agreement had run for fifteen years, neither party could obtain any alteration of the rent though it derived its character of judicial rent from the agreement which had already run for the full term of fifteen years mentioned in section 8 (7). I am unable to see any way out of these difficulties short of holding the agreement illegal and void, which would be tantamount to deciding, after it has been fully acted on, and while both parties are still desirous to recognise its validity, that the Land Commission acted illegally in receiving it, and ought never to have filed it at all. By holding the agreement to be legal, and by giving effect to it according to its terms, all difficulties are avoided, convenience, justice, the object and wishes of both parties, and the object of the Legislature, in encouraging occupants to fix fair rents by giving them the same effect and consequences in all respects as if the rents agreed on were "judicial rents," are all promoted.

I hold that the first question upon the special case must be answered in the negative—*i. e.* to the effect that the applications to fix fair rents for a second statutory term were not served before the expiration of the fourteenth year of the statutory term. The second question is put in a shape which

makes it necessary to add explanatory words; we are asked "whether it was competent for the Land Commission to make an alteration in the judicial rent that would take place *at a less interval than fifteen years* from the date at which the agreement and declaration fixing the fair rent for the first statutory term was entered into"? To prevent the possibility of misinterpreting our decision as sanctioning an alteration of judicial rent at a less interval than fifteen years, I think we ought to add to our affirmative answer the statement of the reason for it—viz. "inasmuch as the judicial rent fixed by the agreement and declaration, and the statutory term during which such judicial rent was payable, commenced, pursuant to such agreement and declaration, upon November 1, 1881, being more than fourteen years before the date of the application to fix a fair rent for a second statutory term."

WALKER, L. J.:—

The question in this case is shortly whether a landlord and tenant can or could agree under sect. 8, sub-sect. 6, that the fair rent agreed on should begin from an earlier period than a judicial rent fixed by the Court could, and consequently the statutory term has an earlier start. It can now clearly be done in cases coming under the 17th section of the Act of 1896.

We did not decide the question in *Dunne, Tenant; Knolles and Babington, Landlords* (1), because it was not necessary, was not argued, and there are difficulties arising on the language of the section.

I agree that an agreement such as we have in this case is not an illegal one, and that it may be brought within the very words of the section. The rent becomes "then the fair rent," though it goes back to 1881, and it is to the "rent so agreed on" that the effect and consequences of a judicial rent are given.

If this were not so it would not be possible to grant specific performance of such an agreement, for "fair rent" cannot be read contract rent in one part and fair rent under the Act of 1881, which was the thing contracted for, in another part of the agreement.

(1) *Ante*, p. 308.

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We have an express decision in *Beauclerc* v. *Hanna* (1) that such an agreement may be specifically performed, and in that case, after the point had been raised, the Land Commission filed, in 1888, an agreement of 1886, which provided that the fair rent should begin from November, 1884.

That is a judicial decision that the contract is binding on both parties, and I do not see any inconvenience or legal difficulty in enabling the landlord and tenant to contract freely on the subject.

There will, no doubt, have been a statutory term existing for some time under which the rights of the parties will by relation have been different from their contract rights, but the fair rent agreement proceeds on the basis that at and up to the date all obligations have been performed on both sides.

I agree, therefore, that we can give effect to the contract which the parties entered into and still desire to carry out. I also think the last question should be answered in the manner indicated by Fitz Gibbon, L.J.

HOLMES, L. J. :—

The Land Law (Ireland) Act, 1881, contemplates that a judicial rent and a statutory term may be the result of either judicial decision or of an agreement between the landlord and tenant. In the former case the judicial rent becomes payable, and the statutory term begins to run from the rent-day next succeeding the decision of the Court. The question involved in the case now stated is the period at which the statutory term began in a number of tenancies, the landlord and tenants of which made a declaration and agreement pursuant to section 8, sub-sect. 6 of the statute, which provides that the landlord and tenant of a present tenancy may agree and declare what is then the fair rent of the holding, and such agreement and declaration, on being filed in Court in the prescribed manner, shall have the same effect and consequences in all respects as if the rent so agreed on were a judicial rent fixed by the Court under the provisions of the Act. Before considering the peculiar features of the present case, it is desirable to see whether any

(1) 23 L. R. Ir. 132.

principle applicable generally to statutory terms originating in agreement has been already laid down. *Dunne* v. *Knolles* (1) was an appeal from an order of the Land Commission, dismissing an application to determine the judicial rent for a second statutory term, upon the grounds that it was made previous to the last twelve months of the current term, and therefore premature. The case, like the present, turned upon the period at which the first statutory term commenced. The agreement from which it sprung was dated the 30th of March, 1882, was lodged on the 5th of April following, and was duly filed at the end of three months from the last-mentioned date. The gale days were the 1st of May and the 1st of November, and if the term began on the 1st of November, 1882, the application would have been premature. This was the view taken by the Land Commission, the judgment being based upon the proposition that the filing of the agreement was tantamount to a decision of the Court, and that therefore the statutory term began from the rent day next succeeding such filing. I was not a member of this Court when the appeal was heard, but I have had the advantage of reading a report of the judgments furnished by the official reporter, from which it appears that the agreement contained a term that the first payment of the judicial rent was to be made on the 1st of May following its date. The *ratio decidendi* was that while filing was a necessary condition to the agreement becoming effective, it was the agreement, not the filing, that created the judicial rent and the statutory term. Therefore the latest date at which the term began was the 1st of May, 1882, the rent day next succeeding the making of the agreement; and inasmuch as on this assumption the application would not have been premature, it was unnecessary to decide whether it began on that day or on the previous 1st of November. Every member of the Court carefully avoided expressing a final opinion on this point, upon the ground that it would be inconvenient to decide a matter immaterial to the then litigants, but probably of considerable importance to many other landlords and tenants.

In the present case some questions referred to but left undetermined in *Dunne, Tenant; Knolles and Babington, Landlords* (1)

(1) *Ante*, p. 308.

Appeal. 1898. FULTON, *Tenant;* TEMPLETOWN *Landlord.* Holmes, L.J.

must be considered. The only thing which the landlord and tenant are required by the statute to agree to and declare is what is then the fair rent of the holding, but as the object of the agreement is to create a statutory term, it is clear that what is meant is not what is the fair rent for the year or the half year current at the time when the document is signed. It is the fair rent for a period of fifteen years, allowing for the vicissitudes of prices and seasons. Accordingly, in the cases now before the Court, the form prescribed by the rules is followed by declaring the intent to be that the said rent, *i. e.* the rent agreed to, may be the judicial rent of the holding. If the documents had stopped there the effect doubtless would have been that the judicial rent as well as the statutory term would have run from the rent day next succeeding their respective dates. But they did not stop there. The twenty-three agreements with which the case stated is conversant were signed at different times on or between the 21st of December, 1882, and the 19th of October, 1883; but each of them contained the following provisions:—"It is also agreed that the judicial rent and term shall commence from the 1st of November, 1881." It is manifest that the intention was that the tenants were to be placed in the same position as if the rents had been fixed on applications made to the Court on the first occasion on which it sat, pursuant to the 60th section of the Act. On the assumption that the statutory term began on the 1st of November, 1881, the tenants applied during the last year thereof for an order determining a new judicial rent. It appears that the cases having been listed for argument on the question now under consideration, counsel on behalf of the landlord stated that he did not object to the statutory terms being taken as beginning at the period mentioned in the agreement; but the Court decided that the landlord and tenants could not create statutory terms from a date prior to the execution of the agreements, that the applications were therefore premature, and that the consent of the landlord's counsel could not give the Land Commission jurisdiction to entertain them. The case was thereupon stated at the request of the tenants, and the essential question for the Court is, what is the effect of the provisions in the documents relating to the commencement of the judicial rent and term? This seems to me to

depend upon the further question whether the stipulation as to the commencement of the term is lawful. Starting from the proposition that landlord and tenant are authorized to agree upon a judicial rent, why may they not provide for the time at which such rent is to commence? To do so is certainly not *malum in se*, nor contrary to public policy. It may be said that as a statutory term carries with it conditions with consequential rights and liabilities, it would cause great inconvenience and confusion if such a term related back. Undoubtedly it would, if the term was the result of litigation; but no such consequences need be apprehended when it springs from contract. Each party before executing the agreement knows or may be assumed to know the circumstances of and the dealings with the holding during the antecedent period, and he need not enter into an agreement that will injure or embarrass him. In every case (and there were many thousands of them) in which a tenant applied to have a fair rent fixed on the first occasion on which the Court sat pursuant to the 60th section, a period often measured by months or years elapsed between the month of November and the adjudication, and yet the statutory term when created dated from that day, if it was a rent day. For these reasons it seems to me that the stipulation in question is both lawful and effective, unless it is forbidden by the Act. If there was introduced into the agreement a term repugnant to or inconsistent with any of the statutory provisions, if, for example, it was stipulated that the statutory term was to last for ten years or twenty years, or that the judicial rent was to be subject to alterations during its currency, the agreement would be absolutely useless for the purpose of creating a judicial rent, and would probably be void altogether. But the provision with which I am now dealing does not seem to me to be of this character. It appears from the 9th paragraph of the case that the Land Commission were of opinion that it is inconsistent with sub-sect. 7 and the other provisions of section 8. It is surely begging the question to say that it is inconsistent with sub-sect. 7, which only enacts that a further statutory term shall not commence until the expiration of a preceding one, and that the alteration of judicial rent shall not take place at less intervals than fifteen years. If the judicial rent and term began

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from the 1st of November, 1881, there would in no aspect of the case be another term or another rent for fifteen years from that date. The only ground that I can see for the suggested inconsistency is to be found in sub-sect. 2 and the beginning of sub-sect. 3 when taken in connection with the final clause of sub-sect. 6. The first-mentioned provisions declare that the judicial rent shall be payable from the rent day next succeeding the decision, and that the statutory term shall begin on the rent day next succeeding the day on which the determination of the Court has been given. The 6th sub-section enacts that the agreement on being filed shall have the same effect and consequence in all respects as if the rent so agreed on were a judicial rent fixed by the Court. If these words import that the agreement can contain nothing except what can be legally introduced into a Court order, there is an inconsistency; but this would, I think, be a forced inference. The date from which a statutory term begins is not one of its essential features in the same sense as its duration and the fixity of rent during its continuance. That such a term commenced on the 1st of November, 1881, is not only possible, but common. The policy of the law has ever been to permit persons to contract for all matters not unlawful; and it especially encourages voluntary arrangements with the view of avoiding contentious litigation. I have already pointed out that what is really authorized by sub-section 6 is the fixing of a judicial rent by agreement, and on the whole, I am of opinion that such an agreement may provide for the time at which the judicial rent is to begin. The final clause of sub-section 6 does not seem to me to make the agreement equivalent to an order of the Court of the same date. It is rather a general provision giving a judicial rent arrived at by agreement the same efficacy as one resulting from decision. For these reasons I am prepared to answer the first question appended to the case in the negative, and the second with the explanation suggested by Lord Justice FitzGibbon in the affirmative; but I do not say that I have not had some hesitation in arriving at this conclusion. I have, however, come at the same time to another conclusion, to which no doubt attaches. If the stipulation in question is not operative, it is, I think, clear that the entire document is void, or is at the least ineffective for the purpose of creating a statutory term. In

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such case it ought not to have been filed by the Land Commission at all; and being filed, neither judicial rent nor statutory term has resulted from it. One portion of it is not severable from the rest. The landlord and tenant only agreed upon a fair rent to the intent that it should be the judicial rent during a statutory term beginning on the 1st of November, 1881. If I were to follow the Land Commission in holding it to be a judicial rent during a statutory term beginning on the 1st of May, 1883, or the 1st of November, 1883, I would be binding the parties by an agreement into which they never entered. The several tenants either were entitled to statutory terms, beginning at the date stipulated for, or they were tenants of present ordinary tenancies from year to year; and in either case they were entitled to have fair rents fixed. I have already said that I adopt the first of these alternatives.

Solicitor for the tenant: *M'Ninch.*

G. Y. D

REG. (RIALL) *v.* BAYLY (1).

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June 4, 8.

Appeal. Oct. 28.

Quo warranto—*Public office held at will and pleasure—Secretary of Grand Jury—Grand Jury (Ireland) Act* (6 & 7 *Wm.* 4, *c.* 116), *sect.* 45.

Quo warranto does not lie in respect of the office of secretary of a Grand Jury in Ireland, such secretary holding office merely at the will and pleasure of the Grand Jury.

A resolution of a Grand Jury appointing an officer to their body is not a matter for *fiat* by the Judge of Assize.

QUO WARRANTO. This was an application to make absolute a conditional order for an information in the nature of *quo warranto* at the relation of W. A. Riall exhibited against R. E. Bayly to show by what authority he claimed to be and act as Secretary of the United Grand Juries of the county of Tipperary; the ground alleged on the face of the order being that the respondent was not duly qualified at the time of his supposed appointment, being then High Constable and collector of Grand Jury cess for two baronies in the North Riding of the county.

(1) Before JOHNSON, HOLMES, GIBSON, and MADDEN, JJ.

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On the 9th March, 1897, the respondent was elected as their secretary by the United Grand Juries of the north and south ridings of the county assembled at Clonmel. He had for some time previously been acting as high constable for two of the baronies of the north riding; and on the 3rd March, 1897, had been re-elected to that office by the Grand Jury of the north riding assembled at Nenagh. On that occasion he had given an undertaking that if elected subsequently as secretary he would resign the office of high constable; and on the 8th March he had lodged with the Grand Jury a resignation of the office of high constable conditional upon his election as secretary.

The two questions discussed during the arguments were, first, whether the office was one in respect of which an information should be granted, the secretary of a Grand Jury holding office merely during the will of the Grand Jury, and being removable by the Grand Jury of any ensuing Assizes at their pleasure (6 & 7 Wm. 4, c. 116, s. 45), though admittedly in practice never removed save by death or for cause;—secondly, whether the respondent was duly elected, this depending on the validity of his resignation. For the relator it was contended that it was not competent to the respondent to resign his office of high constable, and that a conditional resignation was in any event void.

Ryan, Q.C., *C. L. Matheson*, Q.C., *R. E. Meredith*, Q.C., and *J. F. Moriarty*, for the relator.

S. Ronan, Q.C., and *T. S. F. Battersby*, for the defendant.

G. Wright, Q.C., and *J. P. Brett*, for the Grand Jury of the north riding of the county Tipperary.

Cur. adv. vult.

June 8.

JOHNSON, J. [after referring to the terms of the conditional order, continued]:—

The point to be decided at present is whether an information in the nature of a *quo warranto* lies in respect of the office of secretary of the Grand Juries of the two ridings of the county

Tipperary. The leading case of *Darley* v. *The Queen* (1) lays down the principles by which this Court is to be governed. In delivering the opinion of the Judges in that case to the House of Lords, Tindal, C.J., says:—"This information will lie for usurping any office, whether created by Charter alone or by the Crown, with the consent of Parliament, provided the office be of a public nature and a substantive office, not merely the function or employment of a deputy or servant held at the will and pleasure of others, for with respect to such an employment the Court certainly will not interfere, and the information will not properly lie." To illustrate this last position, he refers to the case of *The King* v. *The Duke of Bedford* (2) as the case of an office to which *quo warranto* was not applicable. There a Corporation was by statute authorised to appoint a registrar, to allow him a salary, and to remove him and make new the office at their pleasure. Lord Lyndhurst, the Lord Chancellor, agreed in the opinion of the Judges; and Lord Brougham says:—"It must be considered, however, that this judgment is confined entirely to offices of a public nature, and so far of a public nature that they must be of a substantive nature and independent in their title"; which, as explained by Cockburn, C.J., in *The Queen* v. *Hampton* (3), means that the office is permanent in character as contradistinguished from an office from which a person is removable at pleasure, whatever the period of his office might be. In *Darley* v. *The Queen* (1) all these conditions were fulfilled, and, at page 542, the Chief Justice points out that the Treasurer of the city of Dublin, "though appointed by the magistrates, is not removable at their pleasure, and must, we think, be treated not as their servant but as an independent officer." This is observed by Lord Campbell, C.J., in *The Queen* v. *Fox* (4). In that case the office was that of Clerk of Borough Justices who held his office at their pleasure; and Lord Campbell says:—"It is not an office to be held *quam diu se bene gesserit;* the Justices may remove their clerk without the slightest stain on his character, merely for the purpose of replacing him by a person whom they think fitter for the office." In *Darley* v. *The Queen* (1) the officer was not "removable at pleasure." The reason of this is assigned

(1) 12 C. & F. 520.
(2) 6 East, 356.
(3) 6 B. & S. 923.
(4) 8 Ell. & Bl. 939, 944.

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in *Ex parte Richards* (1), viz. that, if the occupant of this office was turned out and the applicant replaced, he might immediately be dismissed again, so that such an application was both vexatious and idle. In *The Queen* v. *The Guardians of St. Martin's* (2), which was relied on in support of the motion, the office was that of clerk to the Board of Guardians; but there the Guardians were directed by the order of the Poor Law Commissioners to appoint a fit and proper person to be clerk to the Board, "to continue to hold this office until (3) he die, or resign, or be removed"—not by the Guardians by whom he was appointed, but—"by the Commissioners, or proved to their satisfaction to be insane"; and Lord Campbell, C.J. (4) points out that this is equivalent to an appointment *quam diu se bene gesserit*, *i. e.* during good behaviour, and that removal must be on some grounds. In *The Queen* v. *Burrows* (5), which was also relied upon in support of the motion, the office was that of vestry clerk. Under the 13 & 14 Vict. c. 57, s. 6, the vestry was empowered, after seven days' notice, to elect some fit and competent person to be vestry clerk, "who shall not be removable from office except by resolution passed at a vestry to be called for that purpose and with the consent of the Poor Law Commissioners or by order of the Commissioners under their seal." The clerk in that case could only be dismissed by the vestry with the consent of the Poor Law Commissioners or by an order of the Commissioners under seal; therefore in neither of the two last-mentioned cases did the officer hold at the will and pleasure of the Board of Guardians in the former or the vestry in the latter case.

Originally, the Secretary of the Grand Jury was merely their clerk, who received for his remuneration £5 for each Assizes. In 1783, the 23 & 24 Geo. 3, cap. 42 (Ir.), section 9, after reciting the authority of the Grand Jury to grant £5 at each Assize to their secretary, but that no provision had been made for the appointment of such secretary, empowered every Grand Jury at any Assize after the 24th of June then next to appoint a person to act as secretary or clerk to the Grand Jury at the ensuing

(1) 3 Q. B. 368.
(2) 17 Q. B. 149.
(3) *Ibid.* p. 151.
(4) 17 Q. B. 155.
(5) [1892] 1 Q. B. 399.

Assize. This was followed in 1792 by the 32nd Geo. 3, cap. 30 (Ir.), which, by section 33, after reciting the former provision, and that there was no provision for the appointment of such secretary where the Grand Jury had neglected to make the appointment, enacts that the secretary for the time being shall continue in such case to act until another person shall be appointed in his room, and makes provision for receiving affidavits for presentments in case such secretary should die or from unavoidable circumstances be incapable of receiving such affidavits. In 1796, by the 36th Geo. 3, cap. 55 (Ir.), sect. 42, the Grand Jury was empowered to appoint a secretary for the Grand Jury at the ensuing Assizes. Thus the secretary gradually became a county officer, and in 1823 his *status* as a county officer was recognised by the 4th Geo. 4, cap. 43, which gave him an annual salary at the rate in the schedule to that Act, payable by equal half-yearly presentments at each Assizes,—the secretary of the Grand Jury of the county of Tipperary being in the first class at the highest salary. Now the appointment of secretary of the Grand Jury is provided for by the Grand Jury Act, 6 & 7 Wm. 4, cap. 116, sect. 45; and his numerous and varied important public functions, ministerial in character, are prescribed by that statute and by the 31 & 32 Vict. cap. 46, and are such as the public have an interest in; and by section 15 the secretary of a Grand Jury is empowered, with the approval of the Lord Lieutenant, to appoint a deputy, for whom he is responsible, during temporary illness or unavoidable absence.

But though in these respects, so far as regards its public nature, the office fulfils the conditions laid down in *Darley* v. *The Queen* (1), the tenure of the office remains to be considered. Up to the 6 & 7 Wm. 4, cap. 116, the Legislature had dealt with the salary and appointment of a Secretary of the Grand Jury. That Act was passed to "consolidate and amend" the law relating to the fiscal powers of Grand Juries, and, by section 45, it empowers Grand Juries to appoint a proper person to act as their secretary, and then provides for the tenure of his office:—"Every secretary of the Grand Jury now appointed or who shall be appointed hereafter shall continue to act as such until he shall be removed by the

(1) 12 C. & F. 520.

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Grand Jury or until another person duly qualified shall be in like manner appointed." The Grand Jury has power to appoint, and the Grand Jury has power to remove their secretary; his office continues only until so removed, or until a vacancy occurs by death or due resignation. The fact that the Grand Jury is not incorporated does not in my opinion affect this question. Like *Fox's Case* (1), therefore, the office is not held during good behaviour; the Grand Jury may remove or supersede their secretary without consent or interference of any other person or persons. The Judge of Assize has no authority to *fiat* or to refuse to *fiat* a resolution of a Grand Jury either appointing or removing their secretary, and if he adds his *fiat* it is a nugatory act, which neither adds to nor detracts from the validity of the resolution by which a Grand Jury appoints or removes their secretary, and which can be entered as a record in the proceedings of the Grand Jury.

[His Lordship then referred, as bearing out this view, to the minutes in the Crown Book of the proceedings in 1861, in reference to the appointment of a surgeon to the City of Dublin Prisons by the City Grand Jury (2), and continued :—]

The office is, therefore, in my opinion, held merely at the will and pleasure of the Grand Jury, and, as Lord Campbell intimates in *Fox's Case* (1), the secretary may be removed or superseded in his office without the slightest stain upon his character and merely for the purpose of replacing him by a person whom they think fitter for the office. The secretary of a Grand Jury, therefore, has no estate in his office, his tenure being only at the will and pleasure of others, and, in the words of Tindal, C.J., "in respect of such an employment the Court certainly will not interfere, and the information will not properly lie." This view accords with the decision of Richards, B., more than fifty years ago (3), that under section 45 of the 6 & 7 Wm. 4, cap. 116, the Grand Jury have power to dismiss their secretary without assigning any reason whatever; and that decision has never, so far as I can ascertain, been impugned until this motion. I cannot find that the importance or nature of the duties of an office has ever been held to affect

(1) 8 Ell. & Bl. 939.

(2) For convenience, an extract from these minutes is appended at the conclusion of the judgments.

(3) Ir. Circ. Rep. 496.

the case if the office is held at the pleasure of any person or persons, and it is important to ensure certainty in the law as far as is practicable by adhering carefully to settled practice.

For these reasons proceeding by *quo warranto* is not, in my opinion, applicable to the office of the secretary of the Grand Juries of the two Ridings of the county of Tipperary, and I think the conditional order should be discharged.

HOLMES, J. :—

Whatever may be the ultimate result of this litigation, I am glad to be able to say that there has not been brought to my notice anything to suggest conscious impropriety on the part of the persons concerned. I have no reason to think that either Mr. Bayly, or the majority of the united Grand Juries which appointed him secretary, acted otherwise than in good faith; and the legal questions that have arisen seem to me to be consistent with an honest although perhaps erroneous interpretation of the statute.

Mr. Bayly, who was a candidate for the vacant office of secretary of the Grand Juries of the county of Tipperary, had been for some time a collector of Grand Jury cess in the north riding, being reappointed to that position at every Assizes. The wisdom of our ancestors is responsible for the proverb that a man ought not to throw away dirty water before he has taken in clean, to which a well-known critic has recently given the pertinent rejoinder, How is this to be done if the only receptacle for the water is a single bucket. This was the difficulty in which Mr. Bayly found himself. Neither he nor his supporters contemplated his holding the two offices at the same time. If Tipperary were like any other county, the appointment of the secretary would have preceded the appointment of cess collector, and the matter now in controversy could not have arisen; but the North Riding Grand Jury was obliged to complete its business before the united Grand Juries met at Clonmel; and, as Mr. Bayly was not sure that he would be chosen as secretary by the latter, he was naturally anxious in case of failure to retain the office of cess collector. He was accordingly reappointed, but on an undertaking, or at the least an understanding, that he would resign the collectorship in the event of his being made secretary. This understanding has

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been carried out. Whatever his legal position may be, he has not acted as collector; and another gentleman, having given the required security, is now performing the duties, and will, I presume, receive the emoluments of that office. The language of the 46th section of the Grand Jury Act is peculiar. It may be argued that if it were possible for a holder of any of the offices therein named to resign such office at the very time that he was appointed secretary, and if he did so resign, there would be no infringement of the law. It is, however, said that a cess collector who is appointed at each Assizes has no power to resign between one Assizes and another; and the present case is still further complicated by the fact that the security given by Mr. Bayly, without which he is not entitled to act as collector, was a nullity, and it is therefore argued that at the time he was appointed secretary he was neither *de jure* nor *de facto* collector of Grand Jury Cess.

These are interesting and, perhaps, difficult questions; but under any circumstances I would not be disposed to consider them at this stage of the proceedings. The appropriate mode of raising them would be, I think, by pleading to the information, and they ought not to be disposed of summarily as cause against making absolute the conditional order. There is, however, another objection to the issue of the information which ought not to be postponed. It is contended that *quo warranto* proceedings are not applicable to an office held at the will and pleasure of the person or body that appoints to it; and that, as the tenure of the secretaryship of a Grand Jury is of this character, the information ought not to issue.

Now, if there was any real doubt regarding a matter of so much public importance as the tenure of this familiar office, I would say, let the question be raised on the record, so that it may be determined by the highest tribunal, as was done in *The Queen* v. *Darley* (1); but the impression produced on my mind by the arguments addressed to the Court on this subject, is that it is absolutely unarguable. We are dealing with an office, the tenure of which is expressly declared by an Act of Parliament in language of unusual precision. The 45th section, after giving

(1) 12 C. & F. 520.

the Grand Jury authority to appoint a proper person, duly qualified, to act as their secretary, provides that he shall continue to act as such until he shall be removed by the Grand Jury or until another person, duly qualified, shall be, in like manner, appointed. What room is there for doubt here? It is not suggested that any person or authority other than the Grand Jury is entitled to interfere. There is no mode of testing the validity or soundness of the reasons that cause the Grand Jury to act. Is it not clear that—just as the County Surveyor, a much more important office, and requiring far higher qualifications, can be removed, either at the pleasure of the Lord Lieutenant or of the Grand Jury of the county: see section 40—the secretary is dependent on the will of the Grand Jury that appoints him? Even if this involved some great injustice or offended against public policy, I should feel bound to accept the unambiguous language of the Legislature; but it seems to me that arguments, founded on justice or convenience, are all in favour of placing no difficulty in the way of getting rid of an officer who, without any actual bad behaviour or positive neglect of duty, may prove himself distinctly unsatisfactory. Counsel who have contended for the contrary proposition rely entirely upon the decisions in *Darley* v. *The Queen* (1), and *The Queen* v. *The Guardians of St. Martin's* (2). It is true that, in the former of these cases, Chief Justice Tindal says that the treasurer of the city of Dublin, though appointed by the magistrates, was not removable at their pleasure, and, in the latter, Lord Campbell laid down that the clerk of the Guardians held his office during good behaviour; but in neither the statute in the one case, nor in the article of the Poor Law Commissioners in the other, is the language at all similar to that of the 45th section of the Grand Jury Act. The magistrates were given no power to remove the City Treasurer; and, although the clerk was removable by the Commissioners, who were not his employers, the context justifies the view of the Chief Justice that such removal must be for cause.

No doubt the practice has been for Grand Juries to allow their secretaries to hold office as long as they can discharge the

(1) 12 C. & F. 520. (2) 17 Q. B. 149.

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duties, and, perhaps, sometimes even when they cannot. But is not this our experience in every branch of private employment where the right to dismiss, with or without notice, is undoubted? It is, as a rule, the servant who discharges the master, not the master the servant; and there are few employers who have not at some time of their lives, been relieved by receiving notice of departure from an employee whom they had long wished to send away.

Assuming then that a Grand Jury is at liberty at any Assizes to dismiss their secretary for good or bad reason, or for no reason at all, and to appoint another, the question is, Can such an office be the subject of an information in the nature of a *quo warranto*?

A matter of this kind, one would think, ought to have been settled long ago; and yet the authorities on the subject are neither definite nor satisfactory. This arises from two causes. In the first place, although the tenure of the office has been often referred to as an important consideration when an information is applied for, there has been no attempt (as far as I am aware), to deal with this subject distinctly and methodically. When we find a distinguished Judge, in *The Queen* v. *The Guardians of St. Martin's* (1), say, in reference to that case, "The tenure is secure enough to satisfy the rule"; and when we find another distinguished Judge, forty years later, adopt the same words in reference to the case then before him, *The Queen* v. *Burrows* (2), one cannot help thinking that there is some foundation for the charge that we suffer in these islands from a deficiency in the faculty of definition.

The second cause of confusion is that informations have been allowed to go in silence, where the point has not been raised. An example of this is to be found in the case of the office of surgeon to a county infirmary, which, although probably held at the pleasure of the Governors, has, on at least three occasions, been the subject of an information in the nature of *quo warranto*. At length the point was made in *The Queen* v. *The Governors of the Galway Infirmary* (3), on the application for a writ of *mandamus*, consequent upon a judgment of ouster; but it was not decided, as the *mandamus* was refused on other grounds, and in any case the objection would

(1) 17 Q. B. D. 149. (2) [1892] 1 Q. B. 399. (3) 24 L. R. Ir. 210.

have come too late, the proceedings by *quo warranto* having already terminated in a judgment. *The Queen* v. *Darley* (1) is supposed to have marked a new point of departure in the law of *quo warranto*; and there is no doubt that since that decision the information has been allowed in cases in which it would have been previously refused. I have already referred to the statement of Tindal, C. J., that the treasurer was not removable at the pleasure of the magistrates; and when the Lord Chancellor said that the office was of an independent character, I think he meant that the tenure of the office was independent of the body that appointed to it. It has been since recognised that some security of tenure is a necessary condition to *quo warranto*. I do not propose to examine the cases on the subject, but I may take, as an example, *The Queen* v. *Fox* (2). There Lord Campbell said, "The rule must be discharged. The office is held during pleasure. It is not an office to be held *quam diu se bene gesserit*. The Justices may remove their clerk, without the slightest stain upon his character, merely for the purpose of replacing him by a person whom they think fitter for the office." Yet, notwithstanding this, there are several instances of *quo warranto* for offices, the tenure of which is "at pleasure," as distinguished from "during good behaviour." When these are examined, they will be found, I think, to consist of cases, either in which the power to remove is vested in persons different from those who appoint, or in which the removal requires to be confirmed, or may be vetoed by a superior authority. Under such circumstances, the tenure may be regarded, in the words of Erle, J., and Smith, L.J., as "secure enough." I have not, however, been able to find any decision made after the point has been raised and discussed, allowing *quo warranto*, where a body, like a Grand Jury, whose constitution and composition are not the subject of controversy, is given complete and uncontrolled power to appoint and dismiss its own officer. This distinction may serve to indicate the principle that underlies the practice of the Court. The antique and complicated procedure by which the sovereign impleads a subject with a view of ousting the latter from a public office into which he has

(1) 12 C. & F. 520. (2) 8 Ell. & Bl. 939.

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intruded, ought not to be employed unless it is to result in an effective judgment; but how is this possible if the office is held under a master who has complete authority? If he objects to the intruder, he can remove him without the complicated machinery of *quo warranto* by stopping his remuneration, directing the other servants to disregard him, and appointing a successor in his place. On the other hand, the master, if he so desires, can, in spite of *quo warranto*, dismiss the lawful holder of the office, and confer a good title on the intruder by a new appointment. There are two cases in which I think that the remedy by *quo warranto* might be appropriate and useful, even where the office is held strictly at the pleasure of the employer. One is where there is a controversy as to the constitution of the appointing body, as has happened more than once on the appointment of surgeon to a county infirmary. The other is where the appointing body persists in retaining in the office a person permanently disqualified. When instances of this kind occur, they can be considered. For the present it is enough to say that no question has arisen, or is likely to arise, as to the constitution of the united Grand Juries of Co. Tipperary; and that Mr. Bayly, even if he is now barony cess collector, will cease to be so, at least for the time being, when the Grand Jury for the North Riding is empanelled at the next Assizes. Under these circumstances I am of opinion that the conditional order ought to be discharged.

GIBSON, J.:—

The application for *quo warranto* has been resisted upon two principal points; the first, that the appointment was at pleasure only; the second, that an appointment held at pleasure could not be the subject of *quo warranto*.

The office is created by statute, and its nature and tenure entirely depend on the intention that the Legislature has expressed. In making the appointment the Grand Jury have an uncontrolled power of choice, so long as the person selected is duly qualified. They have also an express power of removal. The 45th section does not in terms require that there should be any ground or justification for dismissal; but, on the other hand, it does not say—as section 40, relating to the county surveyor, does—that

such removal is to be at pleasure, or that it is to be at the discretion of the Grand Jury: *Reg.* v. *Darlington School* (1).

The nature of a Grand Jury, which is a fleeting body, having no continued existence between Assizes; the character of the office, breach of duty in which is punishable under section 46 by fine and forfeiture of salary, and not by dismissal; and the apparently unqualified power of removal given by section 45 to the Grand Jury—point strongly in favour of the view taken in *Re Blake* (2). *Hill's Case* (3) is an authority in the same direction, as is also *Reg.* v. *Neligan* (4), where the Queen's Bench held that the surgeon of an infirmary could be dismissed at any time by the Governors arbitrarily. The provision in section 45 requiring the secretary to act until he is removed "or until another person duly qualified shall in like manner be appointed," supplies an argument in favour of the application of these authorities. The new appointment, which is apparently in the absolute discretion of the Grand Jury, would operate as a determination of the old appointment: *Smyth* v. *Latham* (5); *Hill's Case* (3). The statement in Comyn's Digest, "Franchise, F, 32," that an officer can only be removed for cause, though the charter authorises removal generally, applies only to officers of the Crown.

The cases mainly relied upon on behalf of the applicant were *Darley's Case* (6), and the *St. Martin's Case* (7). In the former, the appointing authority had, as Tindal, C.J., expressly states, no power of dismissal; and, in the latter, where the appointment was by the Guardians but the power of removal was vested in the Commissioners, the Court held that the power of removal could only be exercised for cause. The language which had there to be construed, was quite different from section 45. Attention was also directed to another class of cases in this country—where *quo warranto* has been allowed to go without question. But the point was not taken there or noticed; the tenure of the office was not decided; and the position of surgeon is very different from that of secretary of a Grand Jury.

(1) 6 Q. B. 682.
(2) Ir. Circ. Rep. 496.
(3) 8 Moo. P. C. 138.
(4) 14 L. R. Ir. 149.
(5) 9 Bing. 692.
(6) 12 C. & F. 542.
(7) 17 Q. B. 149.

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If the post is held at pleasure only, can *quo warranto* be allowed? The procedure is not appropriate to offices of a paltry character or without the element of permanence. No instance has been cited where the remedy was applied to offices held merely at the will of the appointing body. Different considerations would obviously apply where the power of dismissal could only be exercised with the concurrence of some external controlling department or officer. The necessity for obtaining such consent operates to prevent capricious disturbance. The power of veto or consent would be exercised—at least in the case of Government departments or officers entrusted with the performance of a statutory duty—under a due sense of responsibility. An official who could not be removed without a consent which would only presumably be given for just cause, might fairly be described as enjoying security of tenure.

In this case, as I am of opinion that the post under the statute is at will only, I think that *quo warranto* must be refused. I regret this, as the office is in practice, I believe, held during good behaviour, and possesses what would be regarded by most as substantial fixity of tenure.

It may seem strange that the Court should abstain from vacating an appointment made in defiance of law, and that it should thereby appear to recognise and perpetuate illegality. Whether the Attorney-General could in such a case obtain *quo warranto*, is not before us. The applicant here is a private relator, and possibly may have other remedies—as in *Lawlor* v. *Alton* (1), or by resisting any presentment in Mr. Bayly's favour. There is great force in Mr. Ryan's argument that the office of collector, held by Mr. Bayly, was not and could not be determined by anything that took place at Clonmel, where the members of the North Riding Grand Jury were united to the South Riding Grand Jury for a special purpose, and where, as a distinct body, they never accepted any surrender of the collectorship, even if they had the power: *Worth* v. *Newton* (2); that all the votes given with the knowledge of Mr. Bayly's disqualification were thrown away; and that Colonel Riall was duly elected. If so, no fiat of the

(1) Ir. R. 8 C. L. 160. (2) 10 Exch. 247.

Judge was necessary—a point decided in this Court so far back as the year 1861. In that view, Mr. Bayly would be guilty of intrusion as a usurper, and may, by wrongfully excluding the rightful holder from the emoluments of office, become responsible at law. The decision now given is limited to *quo warranto*, and is not intended to affect any rights that the applicant may otherwise possess.

MADDEN, J.:—

I concur. I rest my judgment upon the general proposition that the powers of the High Court ought not, as a rule, to be called into exercise in order to effect a purpose which can be forthwith lawfully frustrated by the exercise of a legal right. Acting on this principle, Lord Eldon refused to grant specific performance of an agreement to enter into a partnership, and his decision has been always followed in the case of a partnership dissoluble at will. On the same principle specific performance will not be granted of an agreement to create a yearly tenancy, when it is determinable by notice to quit. In the case before us the writ of *quo warranto* is sought for the purpose of ousting Mr. Bayly from office, with the further object of having it declared that Colonel Riall was duly elected. The cases referred to by Mr. Ryan clearly establish the proposition for which he contended. Assuming Mr. Ryan to succeed in establishing that Mr. Bayly was disqualified, and that the members of the Grand Jury voted for him with knowledge of the disqualification, his client would be entitled to a writ of *mandamus*, as a consequence of the present proceedings. The result would be the admission of Colonel Riall to an office from which he could be forthwith removed by the Grand Jury, in exercise of their legal powers; and, inasmuch as Mr. Bayly's disability, assuming it to exist, was but a temporary one, the Grand Jury would be within their legal rights in restoring him to office. What we are concerned with is not the probable action of the Grand Jury, but their powers under the Grand Jury Act. If there were any substantial question to be argued on the construction of the Act, I agree that the writ of *quo warranto* should issue, in order to have the matter formally decided. But I also agree that the matter is too clear for argument, and that

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their secretary is, as we should expect from the nature of his office, removable by the Grand Jury at their pleasure. The application of the writ of *quo warranto* has since the decision in *Reg.* v. *Darley* (1) been largely extended, but it has never been granted in the case of an office the tenure of which afforded no security, legal or practical, that the order of the Court would not become a mere nullity. Taking this view of the case, I express no opinion as to the legality of the action of the Grand Jury. On the one hand, it is suggested that the effect of the statute is to render the two offices of secretary and collector of cess incompatible, with the result that election to one *ipso facto* avoids the other. On the other hand, it is contended that the holder of one is legally incapacitated from appointment to the other. I express no opinion on these points, or upon the further question as to whether Mr. Bayly held the office of cess collector at the date of his appointment to the office of secretary (2).

A. E. R. J.

Appeal. Oct. 28.

The relator appealed, and the Court of Appeal (Lord Ashbourne, C., and Fitz Gibbon and Walker, L.JJ.) affirmed the decision of the Queen's Bench Division.

Solicitor for the relator: *D. J. Higgins.*
Solicitors for the defendant: *Barrington & Son.*
Solicitor for the Grand Jury: *A. Power.*

G. Y. D.

(1) 12 C. & F. 542.

(2) The following is the extract from the record of the proceedings to which the Court was referred by the Assistant Clerk of the Crown, Mr. W. Maybury:—

In the matter of the Town Council and the Grand Jury of the City of Dublin.

1861, November 12th. The City Grand Jury, by their foreman, communicated to Mr. Justice Fitz Gerald their desire to take his opinion and directions as to whether or not the power continues in them, or has been transferred by the Dublin Improvement Act, 1849—12 & 13 Vict. c. 97, sections 40 and 41—to the Corporation of Dublin, of appointing a surgeon to the city of Dublin Prisons, pursuant to 7 Geo. 4, c. 74, sect. 72, an office which the Grand Jury suppose or presume to be vacant by reason of the presentment by the said

Town Council on the 28th October, 1861, of £200, to the Board of Superintendence of the City of Dublin Prisons, to be applied in payment of one year's superannuation allowance from the 1st January to the 31st December, 1882, to Alexander Reid, Esq., surgeon to the city prisons, pursuant to 3 & 4 Vict., c. 44, sect. 5, as per Schedule of Presentments, sect. 14, lodged in this Court under the 43rd section of the Dublin Improvement Act.

Whereupon Mr. Justice Fitz Gerald directs the Grand Jury to attend at the sitting of the Court to-morrow. And, on that day, November 13th, the Grand Jury being in attendance, &c., it was considered expedient by Mr. Justice Fitz Gerald that the discussion in this case should take place to-morrow, the 14th, in the presence of the Town Council at the fiating of the city presentments; . . . .

November 14th.—The Grand Jury and the Town Council being in attendance, Mr. Macdonogh, Q.C., for the Grand Jury, moves that it be an instruction for the Grand Jury that in them continues the power of appointing a successor to Surgeon Reid in the said office. Mr. C. R. Barry, for the Town Council and the Board of Superintendence of the City of Dublin Prisons, contends that there is no vacancy in the said office, and that, even if there were, the appointment to it is vested in the Board of Superintendence, and, a minute or resolution of the Board of Superintendence with reference to said office being read, Mr. Justice Fitz Gerald instructs the Grand Jury to assume a vacancy in the said office, and that in them is vested the power of appointing thereto.

25th November.—The Grand Jury of the County of the City of Dublin come into their box, and the foreman, addressing the Court, requests that they may be furnished by the Clerk of the Crown with the last presentment book remaining in the Crown Office, for the purpose of placing upon it a presentment which they had made, appointing a surgeon to the City of Dublin Prisons.

Mr. Justice Fitz Gerald (the full Court sitting) tells the Clerk of the Crown to hand the book to the foreman, whereupon they retire to their room, and shortly return to Court, handing in the book, in which they have made an entry to the following effect, viz.: —"We present and find that the office of Surgeon to the City of Dublin Prisons is vacant. We present and appoint Humphrey Minchin, being a member of the Royal College of Surgeons at Dublin, to the office of Surgeon to the City of Dublin Prisons, pursuant to the 7th Geo. 4, c. 74, section 72, and 6 & 7 Wm. 4, c. 51, section 3; and submit the same to Mr. Justice Fitz Gerald to be fiated."

Whereupon Mr. Justice Fitz Gerald declines to fiat it, saying that he had already instructed them as to their duties and powers; that he thought they might make the entry in their book as a record of their resolution, but that he must decline to treat it as a matter requiring his fiat or a presentment, and leave any party affected by it to his remedy in this Court or otherwise, as he may be advised.

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1897.
Dec. 14, 15.

FARRY *v.* MARSHALL.
FARRY *v.* GREAT NORTHERN RAILWAY CO. (1).

(1897. Nos. 2070 & 2684.)

Master and servant—Railway Company—Employer's liability—Act of servant ordinarily within the scope of his authority, but done, for the purpose of his employer, under circumstances that rendered it unjustifiable.

The plaintiff, a passenger on the defendant Company's line, alighted at the station next before that for which his ticket was issued. He refused to give up his ticket, alleging that he was breaking his journey, but offered his name and address. The station master thereupon locked the only door leading out of the station, and detained the plaintiff a considerable time, until his ticket was given up. On new trial motion in an action against the Company for false imprisonment.

Held, that the locking of the door being an act of a class ordinarily within the scope of the station-master's authority, and having been done, under circumstances that rendered it unjustifiable, in the course of the servant's employment, and for the purposes of the Railway Company, his employers, the Company was responsible.

New trial motion. These two actions, consolidated by consent, and tried at the Londonderry Summer Assizes before Mr. Justice Gibson and a special jury, were brought by the plaintiff, the one against the defendant Marshall, the station-master at Maguire's Bridge station, the other against the Great Northern Railway Company, his employers, for assault, illegal arrest, and false imprisonment, under the following circumstances:—

On the 18th of March, the plaintiff, a cattle dealer, purchased a return ticket from Bundoran Junction, near which he resided, to Portadown, *via* Omagh. He went to Omagh, and on the 20th returned by the 4 p.m. train from Portadown. He reached Maguire's Bridge at 9.18 p.m. Having learned at Clones that

(1) Before Palles, C.B., and Murphy and Boyd, JJ.

the train did not proceed beyond Enniskillen, and Maguire's Bridge being nearer across country to his home than Enniskillen, he got out at the former station. He was asked for his ticket by the collector, and by Marshall the station-master; he said that it was a return ticket to Bundoran Junction, and that he was "breaking" his journey. He showed the ticket in his hand, but refused to give it up. Marshall locked the door leading out of the station, and said that the plaintiff and his companion (a cattle dealer, who lived near the plaintiff, and was travelling on a like ticket, and acted as did the plaintiff) would not get out till they gave the tickets up. Marshall admitted that "he intended to keep the plaintiff till he carried his point." The plaintiff offered his name and address and the number of the ticket. The station-master asked the plaintiff and his companion to give up the tickets, saying he would give them back if they wished to resume the journey. This (Marshall explained) was to prevent fraud. He offered to show them the regulations (or said he had "instructions"); he did not think they were guilty of any intent to defraud. He at last got them to show their tickets, and then let them out; they had been detained at most about an hour and a-half. There was no violence. The learned Judge, in his report, added that there was no dispute, as he understood, that the bye-laws and regulations of the Company did not authorise, or purport to authorise, the station-master's action in detaining the plaintiff; such bye-laws would, he considered, have been, if they existed, clearly illegal. The "instructions" mentioned by one of the witnesses were the same as the documentary "regulations" referred to by Marshall (1).

At the conclusion of the evidence, Wylie, Q.C., asked for a direction in favour of the Company, on the ground that the detention of the plaintiff by the Company would have been plainly illegal, and that express authority to Marshall from the Company should be proved. He relied on *Poulton* v. *London and South-Western Railway Company* (2); *Barry* v. *Dublin United Tramway Company* (3), and *Kinsella* v. *Hamilton* (4), as establishing that

(1) These, apparently, were not produced at the trial.

(2) L. R. 2 Q. B. 534.

(3) 26 L. R. Ir. 150.

(4) *Ibid.* 671.

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no authority could be implied. The learned Judge concluded his report by stating—"Whatever my opinion might have been apart from authority, I considered I was bound by *Poulton's Case* (1) to rule that there was no implied authority in the station-master; and, as plaintiff's counsel were unable to point out, in the bye-laws, regulations, or elsewhere, any evidence of express authority, I directed a verdict for the Company, and gave judgment accordingly; and I directed a verdict against Marshall, leaving the question only of damages to the jury, who gave £10. The damages were assessed generally, so that if the Company are liable jointly with Marshall the amount is £10."

The plaintiff now moved to set aside the verdict and judgment so had for the Railway Company, and to have a verdict for £10, and judgment, entered for him against the Company, or for a new trial, on the ground of misdirection.

M. Drummond, Q.C. (*J. W. Bird* with him), for the plaintiff.

J. O. Wylie, Q.C., R. Dane, Q.C. (*P. C. Gaussen*, with them), for the Railway Company.

PALLES, C. B.:—

This is an action for false imprisonment. The imprisonment resulted from the shutting and locking, by the defendants' station-master, of the door of the station, under circumstances which the defendants admit, and indeed insist, were unjustifiable. The question is whether the defendants are responsible in law for this act of their station-master.

In relation to this question, the long line of cases to which we have been referred, commencing with *Goff* v. *Great Northern Railway Co.* (2), and ending with *Barry* v. *Dublin United Tramways Co.* (3), have no application. The act which was the subject-matter of complaint in each of those cases was the arrest of the plaintiff by the defendants' servant. Such an act is not within the ordinary scope of the employment of such a servant. In the present case, the act which caused the plaintiff's imprison-

(1) L. R. 2 Q. B. 534. (2) 3 E. & E. 672. (3) 26 L. R. Ir. 150.

ment, viz. the locking of the door, was no more than the exercise by the station-master, although in an illegal manner, of his ordinary control of the station. The station-master was placed there by the defendants to take care of the station. Under certain circumstances it was necessary that he should shut and lock the door, the key of which was put by the defendants under his control. In reference to such an act, the observations of Willes, J., in *Bailey* v. *Manchester, Sheffield, and Lincolnshire Railway Company* (1), apply. That very learned Judge there says:—"A person who puts another in his place to do a class of acts in his absence necessarily leaves him to determine, according to the circumstances that arise, when an act of that class is to be done . . . and consequently he is held answerable for the wrong of the person so entrusted, either in the manner of doing such an act, or in doing such an act under circumstances under which it ought not to have been done, provided that what was done was done, not from any caprice of the servant, but in the course of the employment."

In actions of this class, two separate things are to be considered: first, the act done; secondly, the purpose for which it is done. The error of the defendants' counsel in the present case arises from a failure to keep separate these two matters. If the act is outside the scope of the servant's employment, the master is not responsible, and in such a case it is unnecessary to consider the purpose. All the cases cited are of that description. But, when the act has been shown to be, or evidence has been given that it is, one within the ordinary scope of the servant's employment, then arises the question whether the act complained of was done *for the employer;* as, if the act, although of a class within the scope of the employment, was done by the servant, for his own purposes, such, for instance, as wreaking his own vengeance or spite upon a particular person, the act, although capable of being done within the scope of the employment, is not in fact done within such scope; it is not done *for* the employer.

Thus, it will be observed that, in these two classes of cases, the questions to be determined are wholly different. In the first class, where the act is outside the scope of the employment, there is no

(1) L. R. 7 C. P. 415, 420.

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question of purpose. In the second, where the act is within the scope of the employment, the only question is that of purpose. The present case is, I think, clearly within the second class; and thus the only question we have to consider is that of the purpose. Suppose, in the first instance, that the door remained shut in consequence of a negligent, and not of a wilful, act. Can there be any question as to the liability of the Company, if a passenger, upon alighting from a railway carriage, finds himself in a station from which there is no possible exit, owing, let me say, to the loss of the key of the door through the negligence of the station-master, with the result that that passenger is detained for two hours at the station? I do not suppose that anyone would be hardy enough to argue that in such a case the Company would not be responsible. What is the difference between that case and the present? It is that here the act was an intentional one, whilst, in the case I have put, it was negligent merely. Does, then, the fact that the act was intentional on the part of the servant, although illegal, *per se* render the defendants irresponsible? That question was determined by the Exchequer Chamber, under circumstances which are in principle not unlike the present. I refer to the case of *Limpus* v. *London General Omnibus Company* (1). There a coachman of the defendants, whilst driving their omnibus alongside an omnibus belonging to another Company, wilfully and illegally pulled his omnibus across and in front of the other omnibus, for the purpose of preventing that other from passing the defendants' omnibus. The defendants had given instructions to their driver not to obstruct any other omnibus. The case was tried by Martin, B., who gave the following direction to the jury :—

"That, when the relation of master and servant existed, the master was responsible for the reckless and improper conduct of the servant in the course of the service; and that if the jury believed that the real truth of the matter was that the defendants' driver, being dissatisfied and irritated with the plaintiffs' driver, whether justly or unjustly, by reason of what had occurred, and in that state of mind acted recklessly, wantonly, and improperly, but *in the course of his service and employment*, and in doing that which he believed to be *for the interest of the defendants*, then the defendants were respon sible

(1) 1 H. & C. 526.

for the act of their servant: that if the act of the defendants' driver, in driving as he did across the road to obstruct the plaintiffs' omnibus, although a reckless driving on his part, was nevertheless an act done by him in the course of his service, and *to do that which he thought best to suit the interests of his employers*, and so to interfere with the trade and business of the other omnibus, the defendants were responsible . . . but that if the true character of the act of the defendants' servant was, that it was an act *of his own*, and in order to effect a purpose *of his own*, the defendants were not responsible."

That direction was upheld in elaborate judgments in the Exchequer Chamber by all the Judges who heard the arguments, with the exception of Mr. Justice Wightman. So far as I am aware, it has ever since been regarded as the law; and if a more modern authority be required to support it, it will be found in the decision of the Court of Appeal, cited at the bar: *Dyer* v. *Munday* (1).

In the present case it was practically admitted during the course of the trial, and if not admitted, it is apparent upon the facts proved, that the station-master acted *bonâ fide* in protecting what he believed to be the rights of the Company—in their interest—and not for any purpose of his own. If it is not formally admitted, I have no hesitation in inferring it as a fact, as I am entitled to do, as no question was left to the jury. Drawing, as I do, this inference of fact, *Limpus* v. *London General Omnibus Co.* (2) is a clear authority in favour of the plaintiff. In my opinion the verdict ought to be entered for the plaintiff against both defendants, for the sum assessed at the trial, with costs.

MURPHY and BOYD, JJ., concurred.

Solicitor for the plaintiffs: *T. Bird.*
Solicitors for the defendants: *Crawford & Lockhart.*

A. E. R. J.

(1) [1895] 1 Q. B. 742.
(4) 1 H. & C. 526.

Q. B. Div. 1898.

Jan. 19.

Appeal.

Feb. 22, 23.

M'HUGH *v.* GUARDIANS OF THE POOR OF THE ATHY UNION (1).

(1897. No. 1691.)

Labourers (Ireland) Act, 1886 (49 & 50 *Vict. c.* 59), *section* 8, *sub-section* 2—*Sanitary officer—Clerk of Guardians of Poor—Remuneration for duties performed under the Labourers (Ireland) Acts—Action for work and labour done.*

Section 8, sub-section 2 of the Labourers (Ireland) Act, 1886, provides that an officer of a sanitary authority shall be entitled to be remunerated for any duty performed by him under the Act according to a scale to be fixed by the sanitary authority, with the approval of the Local Government Board. The plaintiff was clerk of the Athy Board of Guardians, an urban sanitary authority, and acted as their sanitary officer in relation to the Act generally, and in particular in relation to a scheme for building labourers' cottages. By a resolution of May, 1893, the guardians had agreed to give him "an adequate allowance" for his services under the Labourers (Ireland) Acts. The plaintiff resigned office in 1896, and sent in a claim for £452 for his services under these Acts. The guardians, by resolution, fixed his remuneration at £28 15*s.* The plaintiff refused to accept the amount, and brought an action for £362, on the special contract contained in the resolution of May, 1893. At the trial leave was given to amend the claim by inserting a count for work and labour done. On new trial motion:—

Held, by the Queen's Bench Division, and, on appeal, by the Court of Appeal, that the only remuneration (beyond his ordinary salary as clerk of the guardians) to which the plaintiff could be entitled as sanitary officer was the amount which the guardians might fix; and that the action did not lie.

New Trial Motion.

The plaintiff was, from 1880 to 1896, the clerk of the defendant Guardians, at a salary of some £185 a-year; he was also their executive sanitary officer. In 1892 some schemes under the Labourers (Ireland) Acts, for providing cottages in the district, were set on foot, and the plaintiff rendered certain services in

(1) Before Sir Peter O'Brien, L.C.J., and O'Brien, Murphy and Gibson, JJ.

regard to the preparation of them. Certain suggestions or resolutions as to his remuneration having fallen through, the further preparation of the scheme were entrusted to a Mr. Dowling; but the Local Government Board having pointed out that the Clerk of the Union, as executive sanitary officer, was the proper person to perform the duty, the defendants passed a resolution, dated the 3rd of May, 1893, "that the Clerk should be responsible for the carrying out of the schemes, and should be remunerated, such remuneration to include a sum of 10*s.* for each site proposed in the scheme, to enable him to pay Mr. Dowling for his services, with an adequate allowance to the Clerk for his own services both in connection with these schemes and in connection with the Act generally." In deference to a suggestion from the Local Government Board, the defendants agreed, by a resolution passed in June, 1893, that the amount of the Clerk's remuneration should be fixed, not on the completion of the scheme, but after the local inquiry had been held. The local inquiry, under the Labourers (Ireland) Acts, was commenced on the 4th of December, 1893, and was completed in the month of January following. The plaintiff's remuneration, however, was not then fixed, and it was subsequently decided by the defendants to fix same at the date of the loan.

In 1896 the plaintiff resigned his office, and subsequently sent in a claim for £452, viz., £240 for keeping the accounts under the Labourers Acts from 1890 to 1896, at £40 a-year, and £212 for "adequate remuneration" in respect of the preparation of the schemes, at the rate of 20*s.* for the sites (115) passed by the Local Government Board Inspector, and of 10*s.* for the sites (194) rejected.

The defendants took the claim under consideration, and ultimately, at a meeting on the 3rd of February, 1897, resolved that the plaintiff be allowed 5*s.* a cottage on the 115 cottages passed by the Inspector. The plaintiff refused to accept this amount, and instituted the present action, claiming £212 for breach of the contract contained in the resolution of the 3rd of May, 1893, and £150 for breach of the contract between plaintiff and defendants, that the latter would give the plaintiff reasonable remuneration for keeping certain accounts in connection with the carrying out

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of the Labourers Acts in their district. The defendants traversed the alleged causes of action; pleaded that the plaintiff had not duly performed his part under the alleged contracts; pleaded, as a partial defence, the Statute of Limitations; and, with a denial of liability, brought £148 15*s.* into Court.

At the trial, before the Lord Chief Baron and a special jury, on the 25th of June, 1897, evidence was given for the plaintiff of the work done by him, and the plaintiff stated that he had been required to continue Mr. Dowling as his assistant after the 3rd of May, 1893. At the close of the plaintiff's case counsel for the defendants applied for a direction on the grounds mentioned in the judgment of the Lord Chief Justice. The Lord Chief Baron stated that, though he was of opinion that the action was not maintainable, he did not think it right, as there were serious legal questions involved, to leave any risk of necessity arising for a second trial, and therefore would not give a direction at that stage of the case, but would leave to the jury the question of the reasonable amount of remuneration for the work done, the pleadings to be amended by adding a count for work and labour done, or any other amendment which might be necessary to raise the question of the defendants' liability upon the facts proved. The evidence for the defence was directed towards proving that most or all of the work was done by Mr. Dowling, but Mr. Dowling admitted that the plaintiff was the officer responsible for the work and had supervised all the preparations. It appeared that the defendants had themselves paid Mr. Dowling at the rate of 10*s.* per cottage, the amount mentioned in the resolution of the 3rd of May, 1893. The jury found that the plaintiff was entitled to £100 for work done in reference to the Labourers Acts, and to £60 for keeping the accounts in reference to the scheme under said Acts. The Lord Chief Baron directed a verdict and gave judgment for the defendants.

The plaintiff now applied to the Divisional Court to set aside the verdict so directed, and the judgment, on the ground of misdirection, and to have judgment entered for the plaintiff for the amount found by the jury.

Drummond, Q.C., and *Clancy*, for the plaintiff.

[They cited *M'Carthy* v. *Guardians of the Poor of the South Dublin Union* (1).]

O'Shaughnessy, Q.C. (*Gordon*, Q.C., and *D. Kehoe* with him), was not called on.

The judgment of the Court was delivered by—

SIR PETER O'BRIEN, L. C. J. :—

We have considered this case very carefully during the argument, and are all of opinion that the ruling of the Lord Chief Baron was right. The plaintiff claimed in this action a certain sum of money, as sanitary officer of the defendant Guardians. Mr. O'Shaughnessy, at the close of the plaintiff's case, asked for a direction for the defendants on three grounds: first, that the action did not lie; secondly, that if it does lie it is only upon the resolution of the 3rd May, 1893, and under that the plaintiff can recover only such amount as is fixed by the Guardians, and that amount has been lodged in Court; thirdly, upon the frame of the pleadings.

In our opinion, after the Act of 1886 was passed, the Clerk of the Union, acting as sanitary officer, could not successfully institute an action against the Guardians unless he could bring himself within section 8, sub-section 2. [His Lordship read the sub-section and continued.] The genesis of that provision seems to have been this. Doubts existed as to the duties of the Clerk of the Union under the Labourers Acts towards the Guardians, and as to whether he was entitled to any, and, if so, what remuneration for work done under those Acts; and, in order to put the matter upon a clear and certain basis, this sub-section, which is in all respects mandatory, was introduced into the statute. The policy of the Legislature in not allowing things to remain at large in a vague and uncertain condition is quite intelligible. I do not think, upon reading this sub-section, that the plaintiff is entitled to recover unless he can show that there is some scale approved of by the Guardians as sanitary authority, and by the Local Govern-

(1) I. R. 2 C. L. 97.

Q. B. Div. 1898.

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ment Board. He has failed to establish this. I do not think "scale" means a general scale applicable to all cases; this interpretation would lead to great difficulty and make the section practically unworkable. I think scale means some sum for remuneration or some rate of remuneration fixed in each case by the Guardians and sanctioned by the Local Government Board. Nothing in our opinion was further from the contemplation of the Legislature than that the Clerk should be entitled in any event or under any state of circumstances to recover what a jury might think fit to award on a *quantum meruit*. But, turning to the resolution of 3rd May, 1893, referred to in the pleadings, upon which plaintiff mainly basis his case, let me see what it is:—"That the Clerk should be responsible for the carrying out of the schemes, and should be remunerated; such remuneration to include a sum of 10*s.* for each site proposed in the scheme, to enable him to pay Mr. Dowling for his services, with an adequate allowance to the Clerk for his own services both in connection with these schemes and in connection with the Act generally." Now, taking the subsection that I have read, and the language of this resolution, I think that the meaning of the resolution clearly is that the allowance should be fixed by the Guardians. The Guardians fixed the sum of £28 15*s.* 6*d.* This sum was peremptorily rejected by the plaintiff, and is it to be said that the plaintiff can recover on a *quantum meruit* when he himself is the first to reject the special contract he has entered into—to reject it without just ground—because if our view is right it was the Guardians who were to fix the remuneration. It is said that the Guardians did not procure the sanction of the Local Government Board to the offer of the £28 15*s.* 6*d.*, but the plaintiff rejected the offer wholly irrespective of this point; he made it manifest that he would not in any event accept the £28 15*s.* 6*d.*

Mr. Clancy, towards the close of the argument, made the point that these duties in regard to the Labourers Acts were not formally assigned to the plaintiff, and, accordingly, that he must be treated as an ordinary individual who has entered into a contract with the defendants, and not as a sanitary officer acting in execution of the Act, and that his right is the common law right of action for work done. This point, if there is anything in it,

was not made by Mr. Drummond in his opening argument. On the contrary, the claim, as put forward in the statement of claim, is as sanitary officer under the Labourers Acts, and as such he purported to act throughout, and as such he was dealt with in the resolution of the 3rd May, which is made by him the foundation of his claim. Mr. Drummond presented his claim as that of a sanitary officer under the Labourers Acts, and, in my opinion, as such it must be dealt with.

Before I conclude I might refer to the case of *Young & Co.* v. *The Mayor and Corporation of the Royal Leamington Spa* (1). In that case nearly all the arguments used here on behalf of the present plaintiff were put forward on behalf of the plaintiff, and rejected by the Court—indeed, nearly all the cases that are generally referred to in claims against Boards of Guardians were cited. There, as the method of contracting pointed out by the statute was not complied with, though the consideration was executed and the works done, the plaintiff's claim failed; here I think the right to recover anything depends upon the fulfilment of statutory conditions, which have not been complied with.

O'BRIEN, MURPHY, and GIBSON, JJ., concurred.

A. E. R. J.

The plaintiff appealed to the Court of Appeal (Fitz Gibbon, Holmes, and Walker, L.JJ.) who dismissed the appeal.

Solicitor for the plaintiff: *C. Friery.*

Solicitor for the defendants: *V. Kilbride.*

G. Y. D.

(1) 8 App. Cas. 517.

Appeal.
1897.

Nov. 4, 5.
Dec. 17.

KENNEDY, TENANT; M'LOUGHLIN, LANDLORD (1).

Landlord and tenant—Land Acts, 1881 *and* 1896—Bona fide *occupation—Assignment of portion of holding—Undivided share—Determination of tenancy without resumption of possession—Partition—Originating notice—Amendment.*

A and B were tenants in common in fee of certain lands. B being in occupation of the whole, and holding A's moiety under a yearly tenancy at a rent, by deed dated the 6th February, 1885, conveyed all his interest in the lands to C, *i.e.* the moiety owned in fee, and his tenant-right in the other moiety. It was agreed between B and C, that C, on getting possession, should give up a certain small portion of the lands for the site of a public building, and accordingly, by deed dated the 15th December, 1886, B and C, without the consent of A, conveyed a small plot of the ground to trustees for this purpose. A civil bill decree for possession by A of his undivided moiety, grounded on notice to quit, was obtained by him, but possession was not taken under it, and C, in 1894, served an originating notice to have a fair rent fixed in respect of A's moiety, and also obtained a decree for partition, which was carried out by deed, the plot conveyed by the deed of the 15th December, 1886, being excluded from the share allotted to A. B obtained an order of the Land Commission, amending his originating notice by substituting the divided for the undivided moiety.

Held (reversing the decision of the Land Commission), that C was entitled to have a fair rent fixed.

In and prior to 1885, John M'Loughlin and William Simpson were tenants in common in fee of portion of the lands of Killaloo, in the county of Londonderry, containing 35A. 2R. William Simpson was tenant to John M'Loughlin of his moiety of these lands under a yearly tenancy, at a rent of £11 12*s.* 6*d.*, and was thus in occupation of the entire 35½ acres. By indenture dated the 6th February, 1885, William Simpson conveyed all his interest in the lands to George Kennedy, *i.e.* the moiety owned in fee, and what was described as his tenant-right interest in the other moiety. About the same time an arrangement was come

(1) Before LORD ASHBOURNE, C., and FITZGIBBON, WALKER, and HOLMES, L. JJ.

to between Simpson and Kennedy, that after Kennedy had got possession of these lands he should give up a certain small portion for the site of an Orange Hall. To carry out this arrangement, by indenture dated the 15th December, 1886, George Kennedy and William Simpson conveyed in fee-simple to Samuel Todd and others, as trustees of the Killaloo Orange Hall, a plot of ground, portion of 35½ acres. The deed operated to convey one moiety of the site in fee, and as to the other undivided moiety of the site, it conveyed a tenancy from year to year, but no consent to that sub-division or assignment was obtained from M'Loughlin, who was the landlord of one moiety. On the 28th June, 1892, M'Loughlin served a notice on the parties, cautioning them against proceeding with the erection of the Orange Hall, and threatening them with a notice to quit, to recover his undivided moiety of the lands. No attention was paid to this, and an ejectment founded on a notice to quit was brought by M'Loughlin. The ejectment was heard by the Recorder of Londonderry, who gave a decree for possession. An appeal was taken from that decree to the Judge of Assize, when Johnson, J., affirmed the decree, but ordered execution to be suspended upon certain terms, and amongst others that George Kennedy should, on or before the 16th April, 1894, apply to fix a fair rent in respect of the subject-matter of the ejectment, and prosecute such application with diligence. Before the time expired Kennedy served an originating notice to fix a fair rent of one undivided moiety of the 35A. 2R. of Killaloo, held by him as tenant from year to year, at the rent of £11 12*s.* 6*d.*, and also instituted proceedings by equity civil bill for a partition of his interest in the holding of 35 acres between him and M'Loughlin. The fair rent application was adjourned from time to time. The civil bill for partition came on before the Recorder of Londonderry, and was dismissed. From that decree an appeal was taken to the Judge of Assize (Murphy, J.), who made an order that there should be a partition of the premises, and that in the partition the Orange Hall should be allotted as part of the share of Kennedy, by whose directions, or with whose consent, it had been erected. A partition was afterwards had, which carried out the order of the Judge of Assize, and allotted to Mr. Kennedy a portion of these lands with

Appeal. 1897. KENNEDY, *Tenant;* M'LOUGHLIN *Landlord.*

the Orange Hall on them. The case then came before a Sub-Commission to fix a fair rent, and the originating notice was dismissed by the Sub-Commission, on the ground that the tenant was not in occupation of the holding.

The landlord died, and an application was made to the Land Commission to continue the proceedings in the name of the representatives of the original landlord, Thomas M'Loughlin, and Joseph Clark. At the same time an application was made to the Land Commission to amend the description of the lands in the holding, by describing them as containing 14A. 3R. 1P., instead of as an undivided moiety of 35A. 2R., and some evidence was given to show that there had been a valid partition, and the Land Commission made the order; but the Land Commission were in entire ignorance of all this litigation which had been going on between the parties, and, as was stated by Bewley, J., in his judgment, if that litigation had been brought to their notice, they would not have made the order without full notice to the other side.

On appeal, the Land Commission, on the 10th July, 1897, affirmed the decision of the Sub-Commission, and from that judgment the defendant appealed.

Drummond, Q.C., and *A. Todd*, for the appellant:—

If this were like *Cummins* v. *St. Leger* (1), where a man was co-tenant along with another, the tenant is entitled now to have a fair rent fixed. Throughout this transaction the tenant acted *bona fide*; when he took the farm he was under an agreement to give portion of it for the site of an Orange Hall. The entire proceedings were carried on simply for the purpose of having the case rightly before the Land Commission. Again, this subletting was trivial only, some 45 feet by 40 feet, and is protected by sect. 7 of the Land Law Act, 1887. The Judge at the Assizes had jurisdiction to put a stay on execution: *Montgomery* v. *O'Hara* (2). It is only on resumption by the landlord that the tenancy could be put an end to. The judgment in ejectment did not determine the tenancy; sect. 50, sub-sect. 2 of the Land Act, 1896.

(1) [1896] 2 I. R. 603. (2) 22 L. R. Ir. 608.

Wylie, Q.C., and *Henry*, Q.C., for the respondent:—

The time of serving the originating notice is the date for ascertaining the *status* of the tenant. The tenant was not the tenant of a holding within the Land Act, and therefore, after the notice to quit had run out, an ejectment had put an end to the tenancy: *Cummins* v. *St. Leger* (1). The stay of execution has no effect once the notice to quit has run out: *Arran* v. *Wills* (2). The power to put a stay on execution is a limited jurisdiction: *Gorman* v. *La Touche* (3).

Dec. 17.

LORD ASHBOURNE, C. [after stating the facts of the case]:—

The Land Commission, on these facts, arrived at the conclusion that at the time this proceeding was commenced, in April, 1894, the tenant was not in occupation, as a certain portion of his undivided moiety was in occupation of the Orange Hall. Nothing is said in the judgment about the sublettings proved in the case, but it may be assumed that they would only have added weight to the *ratio decidendi*. The Land Commission refused to give any weight to the landlord's objection that the tenant could not, in 1894, have maintained an application to fix a fair rent in respect of an undivided moiety. But for the Irish Land Act of 1896, that objection would have been fatal, but it may now be taken as out of the case.

It is, however, of importance to note and bear in mind that the notice to fix a fair rent was in respect of an undivided moiety, which might from its very nature be divided and partitioned at any time, and pending the proceeding the undivided moiety in due legal course becomes a divided moiety.

The dates in the case are interesting and instructive. The originating notice was served on the 12th of April, 1894; a partition of the said lands, in an equity civil bill for that purpose, was duly made on the 22nd of July, 1895, and on the 28th of January, 1896, an order was made by the Land Commission that the originating notice be amended by substituting 14A. 3R. 1P. for the area originally stated, *i. e.* by substituting the partitioned moiety for the undivided moiety. It is to be noted that the

(1) [1896] 2 I. R. 603. (2) 14 L. R. Ir. 359. (3) 26 L. R. Ir. 533.

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Orange Hall and the sublettings under the partition order are situated upon the part assigned to Mr. Kennedy, and that the part assigned to Mr. M'Loughlin is all in the occupation of Mr. Kennedy as tenant. It is therefore manifest that in the originating notice, as it now reads, amended by the order of the Land Commission, it is the ordinary case of a tenant in occupation of an entire holding seeking to have a fair rent fixed. Mr. Justice Bewley pointed out that if a tenant was not in occupation at the date of his originating notice he could not free himself from the objection by getting rid of the subletting before the hearing. But that is not this case. Here the tenant in due course of law turned the undivided moiety of his originating notice into an irreproachable divided moiety; and the Land Commission, by its own order, amended the originating notice to record this substitution. It refused, after full argument, to vary or set aside that amendment. Therefore we must take it that the proper Court made the proper order, enabling the tenant, when his case came on for hearing, to rely upon the clear *status* of an occupying tenant seeking to have a fair rent fixed.

I therefore think that the appeal should be allowed and the order of the Land Commission reversed, with costs.

FITZ GIBBON, L. J.:—

It appears to me that we must either allow the procedure through which the case has gone, including the amendment sanctioned by the Land Commission, to take effect in favour of the tenant, or we must hold that he must begin the whole matter afresh, for no purpose except to state his claim, *de novo*, in the very same form in which it is now stated under the amending order.

So far as relates to the obnoxious site which gave rise to the whole litigation, the tenant, from the moment he first became connected with the property, was never a free agent. He was not, in equity, the owner of the site at any time. His agreement bound Kennedy from the beginning, to give over that portion of the property, in fee-simple, within a year. As a matter of fact, there was then no divided fee-simple land, and the only way in which the tenant could carry out his agreement was

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by going through the formality of a partition, and assigning the site out of his own fee-simple moiety when partitioned. Unfortunately for himself, he postponed the partition, which would have terminated the joint tenure, and would have rendered his present claim to a tenancy in the other moiety irresistible. He got his conveyance in 1886, and it was not until June, 1892, that the present "landlord" served the first notice upon him, which was intended to prevent him from carrying out the contract under which he had purchased. On April 12, 1894, the tenant served his originating notice, and on May 15, 1894, his equity civil bill for partition was unaccountably dismissed. Until the dismiss was reversed, with a direction to carry out the contract in allotting the moieties, he was not able to proceed further.

I base my judgment on the principles which ought to govern the amendment of pleadings. I think we may search the books in vain for a case in which an amendment, allowed by the Court, has been used to put a party out of Court, who could have sustained his action by discontinuing, and beginning again in the amended form, when the amendment was allowed. When the originating notice was first served, the tenant was in a position to obtain, by partition, all the rights in severalty which he subsequently obtained. The amendment merely brought him "up to date," and when the originating notice was first served, he had, potentially and in an inchoate condition, every right which the partition decree afterwards gave him, and which the amendment correctly stated when given. The partition decree altered the mode of enjoyment of the joint property. But it, at the same time, enabled the tenant to complete his contract to give a fee-simple site upon his own moiety for the Orange Hall, and it got rid of his difficulties as to the occupation of the other moiety as an agricultural tenant. As the amendment was allowed, in the first instance, *ex parte*, the Land Commission might have rescinded the order, if justice so required, on hearing the other party. If that had been done, the tenant could at once have served a new originating notice in the amended form. But after hearing both parties, the Land Commission upheld the amendment. No Court ought, when a man asks for bread, to give him a stone, and an order permitting an

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amendment cannot be treated as destructive of the amending party's right to sue. The tenant must now be entitled to the same rights, at least, as if his original pleading had been in the form to which it was amended, and the facts must be dealt with as they stood when the amendment was allowed. If the Court had refused the amendment, and had put him to begin again, as the facts then stood, there would have been no answer to his case; if he could take advantage of the Act of 1896. I hold that the Land Commission was bound to treat the amended originating notice as an originating notice of the original date, and when that is done, we are relieved from the consideration of the questions about the Orange Hall and the sublettings, for they do not affect the divided moiety.

Thus the case is reduced to the Act of 1896, and I see no reason to doubt that section 50, sub-section 2, applies. "Where a tenant would, if this Act had been in force at the passing of the Land Law (Ireland) Act, 1881, be *now* a present tenant, and . . . the landlord *has not* . . . *resumed possession* of the holding, . . . the tenant shall be deemed a present tenant for the purpose of any such application." These words must apply, at the earliest, at the date of the passing of the Act, and I think that they apply at the date of any subsequent hearing. At either of those dates this tenant was the occupier, in severalty, of a holding within the Land Acts. But the definition in sect. 48 carries back the right to the passing of the Act of 1881, for it provides that "in the definition of 'holding' contained in the Land Law (Ireland) Act, 1881, 'parcel of land' shall be deemed to include an undivided share of land, whether held alone, or held under the same contract of tenancy with land held in severalty." Being a person who, I assume, might have been exposed to questions as to his *status*, until the partition was complete, this tenant was allowed to amend after the partition, and, giving him the benefit of the amendment which was made, and ratified after argument, by the Land Commission, he is now the tenant of a "parcel of land" which, under the Act of 1896, must, before the partition be deemed to have been, and which now really is, a "holding" within the Land Acts. The decision of the Land Commission cannot be supported.

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WALKER, L. J.:—

The first question in this case is one of general importance. On the 11th of April, 1894, the appellant was tenant of an undivided moiety, and though at that date it had been held by the Land Commission that such a tenant could be a present tenant, this decision was reversed in March, 1895, and consequently, if nothing more occurred, he would not be a present tenant, so far as regards the point under consideration. But the Act of 1896 not only alters the definition of "parcel of land," so as to include an undivided share, but contains a provision which meets the very case before the Court. The section has already been read. The tenant would, if the Act of 1881 were what the Act of 1896 is, be now a present tenant. If the section stopped there a difficulty might arise on account of the affirmance of the decree for possession on the 20th of March, 1894; but the section goes on in language which extends his *status* up to resumption of possession by the landlord, and therefore includes a case of judgment recovered under which possession had not been taken, thus applying the provisions of the 20th section of the Act of 1881—a natural thing to do under the circumstances. This gets rid of the argument of Mr. Wylie, that the tenant was not a tenant when the Act of 1896 passed.

The other objection was that the tenant was not in occupation of his holding when he served the originating notice on the 12th of April, 1894, and this is certainly true as regards the part conveyed to the Orange Hall, and probably also as regards one, at all events, of the small tenancies referred to in the evidence; but the lands were partitioned in 1895, under the right incident to the tenant's estate, and so far as regards the Orange Hall premises to carry out that contract, which bound the tenant when he acquired the lands, and then on the 28th of January, 1896, the originating notice was amended to make the area correspond with the divided interest allotted, on which there were no subtenancies, and of which the tenant was in complete occupation.

The area had been originally an undivided moiety of 35 acres and 2 roods, and by the amendment it was made 14A. 3R. 1P., and the amending order was not altered though challenged. Thus, the divided interest was substituted for the undivided, and the

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case proceeded on that amended notice. A power to amend is inherent in the Court, and this 14A. 3R. 1P. was the interest before them at the hearing, unless they amended back again, which they did not, and I decline to deal with the originating notice as if unamended.

It is unnecessary, therefore, to express any opinion as to the effect of a partition order which, while the notice is running, changes the tenant's interest by virtue of its inherent character, and possibly involuntarily so far as regards the tenant, so that the undivided interest which was not all in his occupation becomes a divided interest, which he occupied in every part. I do not say this would rehabilitate the tenant in *status*. In this case, with the aid of the amendment, I feel some satisfaction in being able to decide in favour of the appeal.

HOLMES, L.J.:—

Upon the execution of the conveyance of the 6th of February, 1885, George Kennedy became tenant to John M'Loughlin of an undivided moiety of portion of the lands of Killaloo, containing about thirty-five acres, under a yearly tenancy that was in existence long before the year 1881, Kennedy becoming at the same time the owner in fee of the other undivided moiety thereof. The decision of this Court in *Cummins* v. *St. Leger* (1) must be taken as declaratory of what the law was from the time of the passing of the Act of 1881; and accordingly it must be assumed that the undivided moiety, which was the subject of the tenancy, was not a holding to which the provisions of that statute applied. Therefore there is, I think, no doubt that the notice to quit served by the landlord and the civil bill ejectment decree founded thereon determined the tenancy. It was not saved by sect. 13, sub-sect. 5, or by sect. 20 of the Act of 1881, which are only applicable to tenancies within the statute; and the stay of execution placed on the decree by Mr. Justice Johnson, although it is easily accounted for by what had been the practice of the Land Commission theretofore unchallenged, would not have been given if he had anticipated the decision in *Cummins* v. *St. Leger* (1).

(1) [1896] 2 I. R. 603.

Under these circumstances Kennedy remained in possession, although no longer a tenant; and his originating notice to have a fair rent fixed, served immediately after the affirmance of the ejectment decree at the Spring Assizes of 1894, was adjourned from time to time. If it had been disposed of before the 15th August, 1896, the day on which the Act of that year became law, it ought to have been dismissed, for up to that period he had never been a tenant within the Land Law Code. I am unable to find amongst the papers lodged the date of the hearing before the Sub-Commission. It was said in the course of the argument to be the 5th November, 1896; but the precise date is immaterial, as at the re-hearing before the Land Commission in March, 1897, the case was dealt with as one during the pendency of which the Act of 1896 came into force. The important question now to be determined is what was the effect of this statute upon the respective rights of the landlord and his former tenant. Sect. 48, sub-sect. 2 enacts that in the definition of "holding" contained in the Land Law (Ireland) Act, 1881, "parcel of land" shall be deemed to include an undivided share of land, whether held alone or held under the same contract of tenancy with land held in severalty. I am unable to agree with Bewley, J., that this is a declaratory provision in the sense of a provision declaring what the law had been since the Act of 1881. It is an amending provision, passed no doubt in view of the decision in *Cummins* v. *St. Leger* (1). But the amendment is incorporated with, and made of the same date as, the previous statute. Every tenant, whose tenancy being in existence in 1881, *still continued*, would be entitled to the benefit of it, even although his originating notice had been already served and perhaps disposed of by an adverse decision. It will be noticed that I have emphasized the words "still continued." I have done so, because I doubt whether this amendment, taken by itself, would confer any right upon a person who had been tenant of a holding within its terms, but whose tenancy had been previously put an end to under the law as it then existed—such a person, to take an actual example, as George Kennedy in the present case. It is here that sect. 50, sub-sect. 2, comes to

(1) [1896] 2 I. R. 603.

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the tenant's aid. This provision, omitting some words that are irrelevant to my present purpose, is as follows :—"Where a tenant would, if this Act had been in force at the passing of the Land Law (Ireland) Act, 1881, be now a present tenant, and either the landlord has not, since the passing of the said Act, . . . resumed possession of the holding, or, if he resumed, the tenant has redeemed or been reinstated in his former tenancy, the tenant shall be deemed a present tenant for the purpose of any such application." The landlord's counsel ask the Court to put a construction upon these words, which would leave them inoperative. He says that the word "tenant" in the beginning of the clause must mean a person who is still tenant at the time of the application; but if this be so, he is by the force of the amending provisions a present tenant, and would it not be pure nonsense to enact that he shall be deemed to be what he already is? The obvious meaning of the words is, that although the tenancy has been put an end to, still, if the tenant has been allowed to remain in possession, he shall be deemed to be a present tenant for the purpose of the application. There is nothing anomalous in this interpretation; for the effect of it is to do for tenancies in holdings, which are brought within the Act of 1881 by the Act of 1896, what the 20th section of the former Act, according to some judicial opinions, did for tenancies that were from the first within that statute. In *M'Donnell* v. *Blake* (1), Palles, C. B., expresses the opinion that by virtue of this section a tenancy to which it applies does not determine until the landlord has resumed possession either by means of an *habere* or otherwise. The other members of the Court do not go so far as this; and Fitz Gibbon, L. J., in *Gorman* v. *La Touche* (2) says that "it has not yet been decided that actual eviction before the order fixing a fair rent is necessary to deprive the landlord of the benefit of legal proceedings instituted before the originating notice and afterwards regularly prosecuted to judgment." The uncertainty thus existing as to the effect of the early Act may have led to the provisions quoted from the statute of 1896; but whatever may have been its origin, its construction is, I think, reasonably clear.

(1) 28 L. R. Ir. 395. (2) 26 L. R. Ir. 593.

For these reasons I am of opinion that the notice to quit and decree of ejectment did not deprive Kennedy of the right which he would otherwise have had through the Act of 1896, of having a fair rent fixed for the undivided moiety of the lands of which he had been tenant, provided he was in occupation thereof. This was the conclusion arrived at in a somewhat different way by Mr. Justice Bewley; and his judgment dismissing the originating notice is founded entirely upon the tenant not being in occupation within the meaning of the Land Acts. There is no doubt that the tenant had parted with the occupation of all the lands given for the Orange Hall (including the undivided moiety thereof that was embraced in the tenancy) by an assignment which was legal at the time it was made, and which has not, in my opinion, been rendered invalid by the fact that such undivided moiety was afterwards brought within the Land Code by the Act of 1896. The tenant was clearly not in the occupation of this portion of the holding at the date of the originating notice; and it is upon this want of occupation that the decision of the Land Commission is based. The tenant meets it by referring to section 7, sub-section 1 *b* of the last statute. Now, I am disposed, upon consideration, to think (contrary to the impression I formed during the argument) that this provision is confined to actual subletting, or to a transfer of occupation in the nature of subletting, and not to an absolute assignment such as there is in this case. Besides the evidence shows that other portions of the holding were in the hands of sub-tenants, and this Court has no means of knowing whether the part occupied by Kennedy himself was or was not seven-eighths in value of the whole. Under any circumstances I should be very slow to reverse a decision of a Court of first instance that had seen and heard the witnesses on a question of fact; and I am certainly not prepared to do so where there is so much room for doubt as in the present case.

There remains, however, to be considered the important matter of the partition, which took place between the service of the originating notice and the hearing. The right and liability to have a partition were from the first legal incidents of the tenancy. It could have been enforced at any time by either landlord or tenant; and I presume it cannot be dis-

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puted that when the Act of 1896 enabled the tenant of an undivided share of a holding to have a fair rent fixed, this right would extend to the parcel of land which on a partition would be allotted to him in severalty. In fact there would be in the contemplation of the law the same holding and the same tenancy after the partition as before. Now, it is well established by the decisions of this Court that the *status* of a tenant to have a fair rent fixed must exist at the date of the service of the originating notice, and that he cannot in the interval before the hearing, either by arrangement as to occupation or otherwise, better his position. I should be sorry to deviate in the smallest degree from the rule thus laid down; but I doubt if it applies at all to a case where during the proceedings, there has been a change in the physical features of the holding arising from the very nature of the tenancy. In such a case it would seem to me that in determining such a question as occupation, regard ought to be had to the actual parcel of land that is the subject of the tenancy; and if that parcel of land is in the occupation of the tenant, not only at the time of the hearing, but was also so at the date of the originating notice, the condition as to occupation required by the Land Code has been fulfilled. But it is unnecessary to go as far as this in dealing with the present case, which can be decided upon grounds free from all metaphysical subtlety.

On the 28th of January, 1896, after the partition had been effected, the tenant obtained an *ex parte* order from the Land Commission amending the originating notice by substituting for the undivided moiety of the lands therein mentioned the portion thereof that had been allotted in severalty to the landlord, subject to the tenancy. Mr. Justice Bewley complains that when this order was made the Court was in entire ignorance of all the litigation that had been going on so long between the parties, and says that if that litigation had been made known they would not have made the order without full notice to the other side. But an *ex parte* order can always be rescinded, and Mr. Justice Bewley seems not to have been aware that there was an application to rescind the order in question, supported by an affidavit containing eighteen paragraphs, opposed by another affidavit containing twenty-one paragraphs, advocated on the one side by Mr. Wylie,

resisted by Mr. Doyle, and adjudicated on by Mr. Commissioner Fitz Gerald on the 5th of March, 1896, in an order making no rule on the motion. The affidavits referred to set forth in the most minute detail every step in the litigation, and we have thus an amendment obtained from the Land Commission with a full knowledge of all the facts, converting the original application into one requiring a fair rent to be fixed for the parcel of land then the subject of the tenancy, no portion of which had ever been out of the occupation of the tenant. It is to be borne in mind that down to the present moment the landlord has not resumed possession of the holding; and if on the 5th of March, 1896, the tenant had served a new originating notice in the amended form, and it had come on for hearing at the same time as the old one, he would have been entitled to have a fair rent fixed thereon, assuming that the construction I have given of the Act of 1896 is correct.

Occasionally a question arises as to whether an amendment ought to be allowed, which if it related back to the commencement of the proceedings would have the effect of defeating a right such as a defence of the Statute of Limitations, which the other litigant had in the meantime acquired. There is nothing of this kind in the present case. I regard the orders of the 28th of January, 1896, and of the 5th of March, 1896, as having the effect of allowing the tenant to apply, as of the first-named date, to have a fair rent fixed for the parcel of land then in his occupation; and being of opinion, for the reasons already stated, that he was then so entitled, I think that the appeal ought to be allowed.

Solicitor for the appellant: *J. E. Proctor.*
Solicitor for the respondent: *Loughrey.*

R. D. M.

Land Com. 1898.

Feb. 28. March 7.

MULLAN, TENANT; TRAILL, LANDLORD (1).

Tenant's notice of intention to sell—Landlord's notice of intention to exercise the right of pre-emption—True value—Bona fide *disagreement as to price—Mortgagee in possession—Real tenant—Jurisdiction—Land Law (Ireland) Act*, 1896, *sect.* 19.

(1) The Sub-Commission have no jurisdiction to make an order as between landlord and tenant fixing the true value of the holding under the Land Law (Ireland) Act, 1881, sect. 1, unless there has been an actual and *bona fide* disagreement as to the price between the landlord and tenant.

(2) *Sed quære:* Whether such disagreement must necessarily take place after service of the notice of the tenant's intention to sell?

(3) Where the landlord has notice of a valid mortgage subsisting on the tenant's interest, which has not been duly objected to as a sale by him, he cannot thereafter treat the tenant, to the prejudice of the mortgagee, as a person qualified to sell the tenancy.

(4) The mortgagee who holds by such valid assignment, subject to redemption, the interest of the tenant in the tenancy is the tenant of the holding, as between all parties, once the landlord has notice thereof and does not dissent.

JOHN MULLAN was tenant of an agricultural holding consisting of 8A. 0R. 30P. as tenant from year to year at the yearly rent of £4 10*s*. The holding was situated at Castlecat, near Bushmills, in the county of Antrim. By indenture of mortgage dated 20th January, 1894, Mullan assigned the farm to Mr. David Innes, a money-lender and auctioneer of Coleraine. In November, 1896, Mr. Innes, acting as auctioneer for Mullan, advertised the farm for sale, but before the sale took place he received a letter from Dr. Traill, the landlord, objecting to the sale, on the ground that no notice had been served on him under the Land Act of 1881, and offering £45 for a clear assignment of the farm. Mr. Mac Laughlin, the solicitor for Mr. Innes, replied that the sale was being carried out under the Ulster Custom, and that notice was not necessary. Dr. Traill then caused cautionary posters to be

(1) Before MEREDITH, J., and the Hon. GERALD FITZGERALD, Q.C., and Mr. Commissioner LYNCH.

circulated describing the sale as illegal, and stating that he would not accept the purchaser, and would take instant proceedings to have the sale set aside. The auction, however, was held by Mr. Innes on the 20th November, 1896, and the farm was sold to John M'Fadden for the sum of £86. On the 7th December, 1896, Dr. Traill served notice to have the sale to M'Fadden set aside on the ground that the statutory notice had not been served. On December 10, 1896, Mr. Innes and M'Fadden served an ejectment on the title on John Mullan, which was returnable at Ballymoney Quarter Sessions on January 1, 1897. The ejectment was defended on behalf of Mullan by Messrs. Greer and Hamilton, who were paid by Dr. Traill. The ejectment was dismissed without prejudice, Mr. Leech, the solicitor for the landlord, objecting to a decree, as proceedings were pending before the Land Commission to have the sale set aside. Mr. Innes appealed, and at the March Assizes at Belfast, Mr. Justice Gibson reversed the dismiss, and gave a decree for possession, which was duly executed on 6th April, 1897, Mr. Innes being put into possession. Mullan was allowed to remain in the house as caretaker, and an agreement to that effect was signed on the same day. By an order of Mr. Justice Bewley dated January 27, 1897, on the application of the landlord, Mr. Innes was made an intervenient in the proceedings already originated to have the sale to M'Fadden set aside. In May, 1897, the case was heard at Belfast by the Chief Commissioners, who decided that the Ulster Custom did apply on the estate to a limited extent, but that sales by auction were not recognised. Accordingly the Court declared the sale by Mr. Innes to M'Fadden void, and the same was set aside.

After the ejectment proceedings, Mullan apparently at the suggestion of Dr. Traill served a notice upon him, on the 11th January, 1897, of his intention to sell his holding. Subsequently, on the 18th January, 1897, Dr. Traill served Mullan with a notice of intention to exercise his right of pre-emption. Mr. Innes was not served with any notice of this proceeding; but, in September, he received a letter from the landlord's solicitor stating the date and hour when the case would be heard. He, however, took no part in the hearing to fix the true value, which came on before a Sub-Commission, who, by an order dated the 30th

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October, 1897, fixed the true value of the holding at £37 10*s*. The next notice Dr. Traill appeared to have given Mr. Innes of this proceeding was one dated the 15th December, 1897, in which he tendered Mr. Innes £30 15*s*., being £37 10*s*. the amount of the true value as ascertained by the Sub-Commission, less £6 15*s*. arrears of rent, and required him to give up possession. On his refusal to do so, Dr. Traill served a notice of motion for an order directing Mullan and Mr. Innes to execute a conveyance to him of the farm, and for liberty to lodge the amount of the true value in Court. A cross notice of motion was served by Mr. Innes for the same day, for an order that the entire pre-emption proceedings should be set aside, or in the alternative that he should be at liberty to intervene and appeal from the order of the Sub-Commission fixing the true value.

By consent of the parties these applications were treated as a rehearing of the order of the Sub-Commission of the 30th October, 1897, fixing the true value, and in this form the present case came before the Court.

Mr. Innes now contended that the order of the Sub-Commission should be set aside on three grounds: firstly, that there was no *bona fide* disagreement as to value between the landlord and tenant, and that they were acting fraudulently and collusively. Secondly, that such disagreement should arise after the service of the notice by the tenant of his intention to sell. Thirdly, that the relation of landlord and tenant did not subsist between Mullan and Dr. Traill, so as to enable the tenant to serve notice of intention to sell or to confer jurisdiction on the Court to fix the true value. In the alternative he disputed the finding of the Sub-Commission on the question of true value as inadequate.

Matheson, Q.C. (with him *Traill*), for the landlord:—

Mr. Innes cannot now be heard to allege fraud and collusion. He had notice of the proceedings before the Sub-Commission to fix the true value, and deliberately abstained from taking part in them. All he can do now, is to show that the amount of the true value is too low, or that his interest is prejudiced. The mortgagee is in no better position than the mortgagor, and if he advances money on the security of the tenant's interest, he does so at his

own peril. (See judgment of Fitz Gibbon, L.J., in *Farrelly* v. *Waller* (1).) And if the true value is subsequently fixed by the Court at a figure lower than the advance, he must take the consequence.

When the tenant's notice of intention to sell was served, Mullan was in occupation, and he had power to serve such a notice; and the landlord was entitled to deal with it. Consequently the subsequent notice to fix the true value was perfectly regular. The tenant for the time being may sell his tenancy: Landlord (Ireland) Act, 1881, sect. 1. If the mortgagee had been in possession when the notice was served, the case might be different. Once the tenant has served his notice of intention to sell he cannot withdraw it: *Farrelly* v. *Waller* (1). The Act of 1881 gives power to the tenant for the time being, whether mortgagor or mortgagee, to contract with the landlord, but it must be one person who is for the time being in possession. We could claim specific performance against Mullan. Anything amounting to a transfer of the tenant's interest is subject to the landlord's right of pre-emption, and notice of such transfer must be given.

Ronan, Q.C. (with him *W. Moore*), for the mortgagee:—

We rely on a perfectly valid and unchallenged mortgage. The decree of Mr. Justice Gibson was quite valid, and it was followed by execution and possession. This Court has no power to interfere with that, or to compel us to execute a reconveyance. The landlord had long notice of the mortgage, for he got the rent by the mortgagee's cheque; but he made no objection thereto.

A mortgage is now, by the Land Law (Ireland) Act, 1896, sect. 19, a sale, but relieved from certain conditions of the Act of 1881, sect. 1. The section is retrospective: *Fox* v. *Gloster* (2). The Chief Baron's judgment in *Farrelly* v. *Waller* (1) shows that while the holding remains with the original tenant, the only incumbrances thereon must be equitable charges; because, a mortgage by assignment necessarily changes the tenancy, and vests it in the mortgagee: in other words, a legal incumbrance will change the tenancy. The tenancy in this case is now

(1) 28 L. R. Ir. 122. (2) [1897] 2 I. R. 35.

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accordingly vested in Mr. Innes. Mr. Innes was not only the legal tenant, but the tenant in possession, from April 6th, 1897. It is settled law that the tenant must be in occupation at the time the originating notice was served, and when the case is heard. If a change occurs in the meantime the proceedings must be continued in the name of the new tenant. The Court will not fix the true value for the original tenant, which would not be binding on the actual tenant coming in after the service of the notice. The real tenant must sell, and Mullan was only a lay figure.

In order to give the Court jurisdiction to fix the true value, there must be a *bona fide* disagreement between the landlord and tenant as to the price: *Clarke* v. *Taylor* (1). There is no evidence in this case of such a disagreement. The disagreement should take place after the service by the tenant of his notice of intention to sell. [Counsel also cited *Graham* v. *Pim* (2); *London and County Banking Company* v. *Lewis* (3); *Fisher* v. *Coan* (4).]

Matheson, Q.C., in reply:—

The mortgage does not change the tenancy as of its date. The Land Acts deal solely, not with tenants in the ordinary sense, but tenants as defined by the Act of 1881. A tenant is defined as a person in occupation of land under a contract of tenancy, otherwise he is not a tenant at all: *Earl of Meath* v. *Megan* (5). There is no change in the tenancy unless followed by change of occupation. The mortgage had no effect until followed by occupation. Therefore, when the notice of intention to sell and the originating notice to fix the true value were served, Mullan, and no other, was the tenant. Accordingly, the proceedings were perfectly regular at their inception: *Chaine* v. *Nelson* (6); *Smyth* v. *Moore* (7). Where in the course of the proceedings, some person becomes interested other than the original party, he can come in and see that his interest is protected.

(1) 4 I. W. L. R. 28.
(2) M'Devitt's Land Cases, p. 241.
(3) 21 Ch. D. 490.
(4) [1894] 1 I. R. 179.
(5) [1897] 2 I. R. 39.
(6) 12 L. R. I. 272.
(7) 32 L. R. Ir. 129.

Meredith, J.:—

This holding comprises 8a. 0r. 30p.; the rent is £4 10*s.* per annum; and the Poor Law Valuation is £4 5*s.* The tenant is described as John Mullan, and the landlord is Dr. Anthony Traill. On the 19th January, 1898, Dr. Traill served notice of motion before this Court for liberty to lodge in Court the amount of the true value of the tenancy, "and for an order that the above-named tenant and David Innes, mortgagee of the tenant's interest, do execute a conveyance of the said interest to the said landlord." Dr. Traill's application was promptly answered by a notice dated the 21st January, served on behalf of Mr. Innes, claiming that, if necessary, he be at liberty to intervene, and the notice to John Mullan be set aside as fraudulent and collusive, and that all proceedings thereunder be declared null and void, and for a declaration that at the time of the service of the notice by John Mullan the relationship of landlord and tenant did not exist, or in the alternative that the amount of the true value as fixed by the Sub-Commission by their order of 30th October, 1897, was too low, and should be increased.

When the case was first listed before us, it was by consent arranged that Mr. Innes should be at liberty to serve a notice of rehearing, raising the question of jurisdiction as well as that of value, and that all questions between the parties should be decided at one hearing. Accordingly the notice of the 5th February was served, and both applications are now before us. Some suggestions were made that the notice of 5th February was not full enough; but I have rarely seen a more comprehensive or exhaustive document. It states that the notice of rehearing is intended to be prosecuted on the grounds that the order of 30th October, 1897, was made without jurisdiction, inasmuch as the relationship of landlord and tenant was not at or prior to or since the date of the service of the notice of the 11th January, 1897, subsisting between the parties, and that the said order was generally made without jurisdiction, and that said order should not have been made, inasmuch as all proper parties were not before the Court, and also that David Innes being an intervenient under order of the Land Commission dated the 27th January, 1897, was neither served with notice of, nor a party to, the said proceedings,

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and also on the grounds that the said notices of intention to sell, and to purchase, were collusive between the landlord and the said John Mullan, and were in law a fraud upon the rights of the said David Innes as mortgagee over the said holding, and were never served on the tenant of the said holding, and that under the circumstances of the case the landlord should be restrained from acting thereon, and also on the ground that the sum of £37 10*s.* was not the true value of the holding.

Now it is manifest that before determining whether we can grant the application made on behalf of Dr. Traill, we must consider and determine the questions raised by the mortgagee which go to the root of the jurisdiction to fix the true value. Before dealing with the law it is necessary to ascertain the facts which are somewhat complicated: the present proceedings really originated in November, 1896, when a notice was posted of the intended sale by public auction of Mullan's farm. Up to that time Mullan, as between himself and the landlord, was unquestionably tenant of the holding, and entitled to serve any notice under the Land Law Acts required to be served by the tenant. No notice was in fact served on the landlord, the contention on behalf of the tenant, or, rather on behalf of the mortgagee, being that the holding was subject to the Ulster Custom, that the sale was made in accordance with the Custom, and that notice was therefore not necessary. Dr. Traill took a different view of the situation. By a document, which was extensively posted, he described the contemplated sale as illegal, and intimated that he would not accept the purchaser, and that he would take steps to have the sale set aside. He also wrote a letter to Mr. Innes who (as now appears) was the legal mortgagee of the tenant's interest as well as the auctioneer engaged in carrying out the sale; and that letter is relied on by Mr. Innes as demonstrating that on the 9th November, 1896 (the date of the letter) Dr. Traill was aware of the existence of the mortgage to Innes. Dr. Traill replies, and in our opinion, correctly, that the letter proves nothing more than that Dr. Traill knew that Innes had some claim against Mullan. Notwithstanding the posting of the notice and the receipt of the letter, the sale was proceeded with, and the lands were disposed of to a purchaser named M'Fadden, after competition more or less spirited. Dr.

Traill took immediate proceedings to set aside the sale on the grounds that no notice under the Land Act of 1881 had been served on him, and that the holding was not subject to the Ulster Custom, or at all events that the Custom of the estate did not extend to sales by public auction.

Mr. Innes was not in the first instance made a party to the proceedings to set aside the sale, but on the 27th of January, 1897, Dr. Traill applied to have him added as a party upon the grounds stated in an affidavit made by Mr. Hunt Leech, Dr. Traill's solicitor. This affidavit has been incorporated by reference in one of the affidavits filed for the purposes of the present hearing, and it is of importance as explaining the position of affairs at the end of January, 1897. Mr. Leech refers to the auction, and then proceeds: "After said sale a Civil Bill ejectment on the title was brought by the said John M'Fadden and David Innes in the County Court of the county of Antrim for recovery of the possession of the said farm from the said tenant John Mullan, and the said ejectment having been entered for hearing before the Recorder of Belfast and County Court Judge of the county of Antrim at Ballymoney, on the 1st of January, instant, I appeared on the said hearing on behalf of the said landlord, and applied to the said Judge to adjourn said ejectment, or not to hear the same pending the decision of the application to this honourable Court as to the right of sale by public auction, without the service of the prescribed notices. The said tenant by his solicitor appeared to defend the action, and after hearing evidence the Judge dismissed the case without prejudice, upon the plaintiffs by their counsel refusing to consent to an adjournment. Upon the hearing of the said ejectment it was alleged on the plaintiffs' behalf that the sale to the said John M'Fadden had been made under a power of sale in a mortgage from the said John Mullan to the said David Innes, though no conveyance had been executed to the said John M'Fadden, and the conditions of sale were produced, showing that such was the case. An appeal has been taken from the said decision as I have been informed and believe. Having regard to the said conditions of sale, and to the fact that the said David Innes claims to have sold the farm on his own behalf under such power of sale as aforesaid, the landlord is advised that it

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is necessary that the said David Innes should be served with a copy of the originating notice for the purpose of making him a party to, and binding him by, the proceedings." On that affidavit the Court made an order adding Mr. Innes as a party, and it appears from the record that Dr. Traill was ultimately successful in setting aside the sale to M'Fadden, the Land Commission having held that the sale by public auction was not made in accordance with the custom obtaining upon the estate. I may remark incidentally that the appeal taken by Innes from the decision of the Recorder was heard at the Spring Assizes of 1897, and resulted in a decree for the plaintiff, under which Innes went into possession of the holding, and has ever since continued in possession. Meanwhile, however, the proceedings to ascertain the true value of the tenancy (the subject-matter of the controversy now before us) had been instituted.

It appears that on the 11th of January, 1897, a notice of intention to sell the tenancy, signed by Mullan, without the knowledge or consent of Innes, was served on Dr. Traill; and upon the 18th of January an originating notice in the prescribed form was served by Dr. Traill upon Mullan only, stating that "having received notice from you of your intention to sell your tenancy, and *having disagreed with you as to the terms of the purchase thereof* by me, I electing to purchase the same under clause 1 of the Act, apply to the Court to ascertain the true value thereof." On the 30th of October an order was made by the Sub-Commission, presided over by Mr. Tuckey, fixing the true value at £37 10*s*. The landlord alone gave evidence before the Sub-Commission. Mullan did not appear. Dr. Traill's application is, that having obtained that order he is entitled to a conveyance from Mr. Innes, the mortgagee, as well as from Mullan the tenant. Mr. Innes in the first place impeaches the entire transaction as collusive, and avers that Dr. Traill, with full knowledge of his position, deliberately refrained from making him a party to the true value proceedings, in order to commit what would amount to legal fraud upon the mortgagee, and that we should dismiss the application of Dr. Traill on that ground. We rule against Mr. Innes on this point, but as the case has been made, I must refer to the affidavit of Dr. Traill. "It is untrue" (he says) "that I admitted on oath

that I had retained Messrs. Greer and Hamilton to act for me in the name of John Mullan. What I did admit, and now repeat, is that in December, 1896, John Mullan came to me and told me that he had been served with ejectment proceedings by David Innes, and had no money to pay a solicitor to defend himself. I told him to go to Messrs. Greer and Hamilton, who have never been my solicitors, and instruct them to defend him, and that I would guarantee their costs, and accordingly I wrote to them that I would do so. I would gladly assist any of my tenants from being turned out of their farms by a money lender." He then goes into the dealings with the lender, which are wholly unnecessary to notice, as the mortgage is not impeached. Then he proceeds: "He denied to me on several occasions that he had given any assignment of his farm, nor had I any notice of such, and I only came to hear of it for the first time in an indirect way after the hearing of the ejectment proceedings in Ballymoney, in January, 1897, where my present and only solicitors appeared and intervened on my behalf." Dr. Traill's attitude towards Mullan is thus clearly and frankly defined. He was anxious that Mullan should have the benefit of the best legal advice in his contest with Innes, and he made no secret of his anxiety. I come now to what we consider the real grounds of objection to Dr. Traill's application.

It has been decided in a recent case, *Clarke* v. *Taylor* (1), that a *bona fide* disagreement between landlord and tenant is necessary to confer jurisdiction upon the Court to fix the true value of a tenancy. Assume that Mullan was tenant of the holding within the meaning of the Act of 1881, was there a disagreement between Mullan as tenant, and Dr. Traill as landlord, sufficient to confer jurisdiction on the Court to fix the true value? It was argued by Mr. Ronan, though not very strenuously, that the disagreement must take place between the date of the service of the notice of the tenant to sell and of the landlord to buy. But that would be a very narrow construction to place upon the words "in the event of disagreement." It is not necessary, however, to decide the point, as we are of opinion that nothing occurred between Mullan and Dr. Traill (either before or after the service of the notices) capable

(1) 4 I. W. L. R. 28.

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of being considered a real disagreement as to the terms of the purchase of the tenancy. What are the facts? Dr. Traill had become aware (for so we hold upon the evidence) that Mr. Innes was a mortgagee of Mullan's interest. Dr. Traill was led to believe that the mortgagee was treating Mullan harshly. Mullan came to Dr. Traill not as a vendor of a tenancy at all, but as an applicant for aid in his contest with Innes, and relying on the good will of the landlord, who would gladly assist a tenant from being turned out of his farm by a money-lender. The account of Dr. Traill does not suggest a disagreement as to the terms upon which the tenancy was to be sold by Mullan and bought by Dr. Traill. It is as follows:—"After the ejectment was dismissed at Ballymoney, John Mullan came again to me and asked me how he could best get out of his difficulties: and I told him that if his farm could be sold at such a reasonable figure as to enable a settlement with Innes to be come to, I would secure him in his house as a home, but that he could not expect me to pay his debts and give him back his farm." In his oral evidence he said the disagreement consisted in this:—Mullan said, "Get rid of Innes and pay him off as cheaply as you can, and relet the farm to me at a higher rent." Dr. Traill said he could not do that, but offered to secure him in the house. Beyond this there is no suggestion of an offer made or refused, nor of terms of purchase debated, discussed, or declined. None of us think it would be consistent with the decision of previous cases on the subject of disagreement to hold that what happened in this case amounts to a *bona fide* disagreement within the meaning of the Act and Rules. We hold, therefore, that the Sub-Commission had no jurisdiction, nor have we any jurisdiction, to entertain the question of true value.

Perhaps it might be sufficient to leave the case there. However, as another point has been strongly urged by Mr. Ronan as fatal to Dr. Traill's application, and as we entertain a clear opinion in reference to it, I think it better to state what our opinion is. We are satisfied upon the evidence that Dr. Traill had ample notice of the mortgage and of the mortgagee's claim to recover possession of the holding prior to the 11th January, 1897, when notice of intention to sell was served on Dr. Traill by Mullan only. Under these circumstances we hold that Mullan was not

tenant of the holding within the meaning of the 1st section of the Land Law (Ireland) Act, 1881. Mr. Matheson says a tenant is a person "occupying land under a contract of tenancy." Mullan was, no doubt, in occupation, but he had assigned the tenancy to Innes the mortgagee. Innes was the real owner of the tenancy in law and in fact, for only a worthless equity of redemption remained in the impoverished Mullan. So long as Innes gave no notice of his mortgage, Dr. Traill was free to deal with Mullan as tenant. Numerous cases decide that a mortgagor in possession is entitled to serve notice to fix a fair rent; but how do these authorities apply to a case where the mortgagee being the legal assignee of the tenancy asserts his right to oust the mortgagor and to go into possession of the holding, and in the exercise of his legal right to recover possession is temporarily delayed and defeated by the action of the benevolent landlord who disapproves of money-lenders. For, if Dr. Traill had not been represented before the learned Recorder, and if Mullan had not been assisted by Dr. Traill to make a similar appearance, I can hardly doubt that the decree which was afterwards made at the Assizes, would have been pronounced on the 1st January, 1897, by the County Court Judge.

The case of *Fisher* v. *Coan* (1), heard by the Vice-Chancellor before the Act of 1896, decided that a legal mortgage was not a sale within the meaning of the Land Act of 1881. The Vice-Chancellor held that there was nothing in the Land Acts to prevent the tenant of a holding from executing a legal assignment of his tenancy by way of mortgage, and that the execution by a tenant of a mortgage did not confer a right of pre-emption upon the landlord. The 19th section of the Land Act of 1896, provides that "The alienation to one person only of a holding by way of mortgage shall be a sale within the meaning of section 1 of the Land Law (Ireland) Act, 1881, but the provisions of the several regulations thereof other than regulation (6) shall not apply thereto." The right of the tenant to alienate his holding by way of mortgage is thus recognized by statute, and the only right given to the landlord is the right which he must exercise

(1) [1894] 1 I. R. 179.

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within the prescribed period (which is one fortnight after the sale, that is the mortgage, has come to his knowledge), to refuse on reasonable grounds to accept the purchaser, that is the mortgagee as tenant. Now, beyond all doubt Dr. Traill's solicitors had notice of the mortgage on the 1st of January, 1897, and the facts relating to the mortgage had come to the knowledge of Dr. Traill before the 11th of January. No steps were ever taken by Dr. Traill under regulation (6) to refuse "on reasonable grounds" to accept Innes as tenant. I have no doubt that Dr. Traill acted wisely and prudently in refraining from taking any such steps. But in such a state of facts how can we hold that Dr. Traill was entitled to ignore the existence of the real tenant of the holding, and deal with Mullan as if the mortgage deed was waste paper. Possibly (as Mr. Matheson argues) Mr. Innes was not in a position on the 11th of January to serve notice of intention, for although Innes was the real tenant he was not in occupation. But beyond all doubt Mullan, who was not the tenant, could not, by the mere fact of his occupancy, give force and validity to such a notice, and thus in defiance of his assignee, the real tenant, confer the right of pre-emption upon the landlord. Therefore, on both grounds, first, that there was no *bona fide* disagreement as to price, and secondly, that the notice of the 11th January was not served by the true tenant, we hold that Dr. Traill was not entitled to institute this motion. We all, my colleagues and myself, desire to say, that there was absolutely no foundation for the statement, that Dr. Traill was actuated by any other desire, than to serve and assist Mullan, and to exercise, so far as the law allowed, the rights he believed himself to possess.

No rule on the motion and no costs. On the rehearing we reverse the decision of the Sub-Commission, and dismiss the originating notice. We allow Mr. Innes the costs of the rehearing.

Solicitors for the landlord: *Crookshank & Leech.*
Solicitor for the mortgagee: *Mac Laughlin.*

J. MAC M.

IN RE HARKNESS' ESTATE (No. 2) (1).

Land Com. 1898. Jan. 3, 4. *Appeal.* 1898. Jan. 25–28. Feb. 18.

Land Purchase Acts—Land Law (Ireland) Act, 1896, *s.* 40—*Jurisdiction of Land Judge—Jurisdiction of Land Commission—Guarantee deposit—Land stock—Report of two Land Commissioners—Price at which sale should be made.*

The Land Commission, at the request of the Land Judge, pursuant to section 40, sub-section (1), of the Land Law (Ireland) Act, 1896, caused an estate to be inspected and a report to be made by two Commissioners respecting, amongst other matters, the price at which the sale of their holdings could properly be made to the tenants on the estate under the Land Purchase Acts. Having considered the report, and having given all parties an opportunity of being heard, the Land Judge directed offers to be made to the tenants to sell them their holdings at prices in Guaranteed Land Stock higher in most cases than those mentioned in the report, and these offers were accepted by the tenants. When the applications for the advance of the amounts of the increased prices in Guaranteed Land Stock came before the Land Purchase Commissioner, he in some cases, not being satisfied as to the sufficiency of the security, refused the applications:—

Held, by Bewley, J., and on appeal by the Court of Appeal (*diss.* Porter, M.R., and FitzGibbon and Holmes, L.JJ.), affirming the decision of Bewley, J., that the Land Commission, not being satisfied as to the sufficiency of the security, was not bound to make an advance to the tenants in Guaranteed Land Stock to the amount of the prices so fixed by the Land Judge.

MOTION on behalf of the petitioners having carriage of the proceedings for sale in the Land Judge's Court, by way of rehearing of certain applications for advances under the Land Purchase Acts, that orders of Mr. Commissioner Lynch, dated the 8th November, 1897, refusing those applications, should be rescinded, and that the said advances should be sanctioned. The motion for rehearing was made in pursuance of directions given by Ross, J., as Receiver Judge (2).

(1) Before BEWLEY, J.

(2) The following judgment was delivered on this occasion (20th December, 1897) by Ross, J.:—

This case came before me as Receiver Judge for directions. It raises

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The estate had been ordered to be sold in the Land Judge's Court, and the Land Commission, at the request of the Land Judge, under section 40 of the Land Law (Ireland) Act, 1896 (59 & 60 Vict. c. 47), caused it to be inspected, and a report to be made by two Commissioners, respecting, amongst the other matters specified in sub-section (1) *a*, the price at which the sale of the holdings to the tenants under the Land Purchase Acts could properly be made.

questions of the greatest importance under the following circumstances:—Pursuant to section 40 of the Land Law (Ireland) Act, 1896, the usual request was issued from this Court to the Land Commission. When the report came on for consideration early in the year, after a full hearing, I fixed the prices in Guaranteed Land Stock; in a few cases small sums in cash were added. The prices in Land Stock suggested by the Land Commissioners were in many cases adopted, but in the majority of the cases the prices were substantially raised. During the argument it was urged on behalf of the tenants that this Court, in the absence of competing offers, was bound by the report of the Commissioners, and that they had the power to refuse the advance in Land Stock. The judgment reported in [1897] 1 I. R. 431 deals with the contention. I pointed out that the valuation of the Commissioners was made without hearing the parties, that the duties and responsibility of fixing the price, whether in stock alone or in stock and cash, were cast by the section upon the Land Judge; that the offer must be communicated to the tenant by the Land Commission; that this was followed by a direction that the sale must be carried out accordingly; and that from this it must be inferred that after acceptance there was no power in the Land Commission to interfere with the completion of the sale. For any ordinary tribunal such a decision would have been sufficient. It relieved the Commissioners from all responsibility in case the advances were inadequately secured. The entire responsibility was assumed by and rested on this Court. The Commissioners are, however, of opinion that the public funds are not sufficiently protected by the decisions of a Judge of the High Court of Justice, and in this case boldly claim the right to upset the entire transaction by refusing to advance the amount of stock directed. Their contention is that, although their duties as defined in the section are to inspect and report, and, when the price is fixed by the Land Judge, to communicate his offers and carry out the matter to completion, there yet remains in them a power not alluded to in the section, of withholding the only means by which, in ordinary cases, the sales are to be carried through. Although there are many things doubtful in the section, there is one thing absolutely clear to both layman and lawyer, and it is this—that while the manner of making the offer is left to the discretion of the Commissioners, they have no power to alter or amend the offer itself as fixed by the Land Judge. They

When this report came before the Land Judge for consideration, he was of opinion that the prices named were in some cases too low, and he ordered that the fee-simple of the holdings should be offered to the tenants in those cases at increased prices in Guaranteed Land Stock.

See the case reported, [1897] 1 I. R. 426, where the facts and particulars of the Land Commission Report, dated 20th February, 1897, appear.

cannot add to it or take away from it, impose conditions on it, or modify it in any shape or form. But the Commissioners, in open defiance of the law, proceeded to add to the offer a statement to the effect that they (the Commissioners) might not make the advances fixed by the Land Judge—that is to say, that the messenger whose duty it was to communicate the offer, in effect added that the offer was a nullity, except in so far as he (the messenger) chose to allow it to take effect. This extraordinary addition was calculated to prevent the tenants from accepting the offers at all. The result might have been to render it impossible to raise the serious question now awaiting decision. Fortunately, the tenants disregarded the addition, and, with one exception, accepted the offers at the prices, and on conditions settled by this Court. The question is now whether the sale is to be completed accordingly or not. As this must go to the Court of Appeal, their lordships have a right to know the ground on which my decision rests. Nobody has any doubt that in cases of voluntary sales the amount of the advance is within the absolute discretion of the Commissioners. They are trustees of public moneys. They must be satisfied with the security, and on them alone rests the responsibility. But when, for the first time in the history of the Irish Land Laws, the Legislature takes the momentous step of introducing compulsory sale, is it to the Irish Land Commission the power is entrusted? It would certainly not conduce to public confidence in the procedure if it were the case that an absolute discretion as to the advances should be entrusted to the very body whose duty it is to collect the instalments, whose boast it is never to have lost substantially any of the money so advanced; and who would be suspected of a tendency to facilitate the collection of the instalments by making the advances as small as possible. In the case of the voluntary vendor, he need not agree if he considers the amount of the advance inadequate. Under the 40th section the Land Commission are not predominant; their position is altogether ancillary. To begin with, they are to cause an estate to be inspected, and a report to be made by two of their Commissioners as to the price and conditions under which a sale to the tenants under the Land Purchase Acts can properly be made. This presupposes that the purchase money is be wholly or partially in Land Stock. At that point, for the present, the functions of the Land Commission cease. The Land Judge must then take the matter up. It is to be observed that there is

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The offers, on printed forms, with forms of acceptance by the tenants, and of applications by them to the Land Commission for advances of the sums specified annexed, were sent to the tenants by the Land Commission. In the fold of each document was a notification from the secretary to the tenant as follows:—"I am directed by the Irish Land Commission to communicate to you the within written offer for the sale to you of the fee-simple of the holding therein described, and to request that in the event of

no obligation on the Land Judge to ascertain the views of the Land Commission as to the amount of the advance. He is bound to hear the parties, to consider the report and the offers, and any other matters which may be brought before him (which I take it means he may hear evidence), and the general circumstances of the estate (which I understand to mean that he may have regard to the facts known to him as Receiver Judge). Then he is to make his offer to the occupying tenant, at such price and subject to such conditions, whether as to payment of part of the price in cash, or *et cetera*, as he may consider reasonable and just. These latter words contemplate the Land Judge in certain cases fixing part of the price in cash. What is the other part to consist of? To this there can be but one answer—in Land Stock. Again, he is not bound in every case to direct part of the price to be paid in cash. In what is it to be paid where no cash is ordered? In Land Stock obviously. The Land Judge must determine what part of the price is to be paid in cash, and what part in stock. It is wholly impossible for him to fix the price "having regard to the interest of all persons interested in the estate," without considering whether it is stock or cash he is giving the landlord or incumbrancer in lieu of the rent, the former being usually 13 per cent. more valuable than the latter. We, therefore, arrive at the conclusion that the price at which the fee-simple is offered to the tenants may be partly or wholly in Land Stock, as fixed by the Land Judge. When all this has been done, the Land Commission take the matter up again. But they are given no power whatever except to carry into execution what has been ordered. They have no right to say that the offer is made subject to their approval. The offer at a price in stock, or partly in stock and partly in cash, they are bound to communicate. They cannot alter the cash, and, I think it is plain, they cannot alter the stock. What inference can be drawn from the fact that the public body who supply the stock are bound to make the offer, other than this—that they must advance the stock mentioned in the offer, if it is accepted? The concluding words of sub-section (*c*), "and the sale shall be completed accordingly," in all common sense can only mean that the sale shall be carried out through the Land Purchase Acts in the terms of the accepted offer. But the matter does not rest there. In sub-section (*a*) the Land Judge, if he thinks it expedient, may order that an unwilling fourth, or "any of them," may be deemed to have accepted the

your wishing to accept the offer you do sign the acceptance thereto annexed either in the presence of a magistrate, commissioner to administer oaths, notary public, clergyman or solicitor. The offer, when accepted, should either be handed to the officer of the Land Commission, or transmitted without delay through the post to 'The Secretary, Irish Land Commission, 24, Upper Merrion-street, Dublin.' The Land Commission have no power to entertain any application to vary the terms of the offer. In the event of your

offers made to them, and this section, and the Land Purchase Acts, shall apply accordingly." This, in short, means that he can coerce them to purchase according to the terms of the offer. Can anybody explain how this order can take effect if he has not the control of the means by which the purchase is to take place? Annexed to this sub-section there is a proviso which makes the matter clearer still. It is not a proviso that the Land Judge is not in such cases to fix the purchase-money at a higher figure than the Land Commissioners think proper to advance. The proviso prohibits the Land Judge from making the coercive order in a case where the purchase-money would exceed the limitation imposed by the purchase of Land Act, 1888. What are we to infer from this? That but for the proviso the Land Judge's order would be effective in respect of a larger amount of stock than the Commissioners could lawfully advance. Further, I have to point out that if the contention of the Land Commission is correct, they can control the amount of the advance up to the last moment. The report of the two Commissioners in no way binds the Land Commission. Even assuming that the Land Judge adopts the estimate suggested in the report in Land Stock—makes the offer to the tenants on this basis—if the Commissioners' contention is good at all, there is nothing to prevent the Commissioners from refusing the advance, even after such an offer is made and accepted. This would make the section chaotic. For these reasons, I am of opinion that, while in cases of voluntary sales the Commissioners are the sole tribunal to determine the amount of the advance, in cases of compulsory sale there is another tribunal on whom the onerous duty and responsibility is thrown, and that in this latter case they are no longer trustees bound to inquire and exercise a discretion, their plain duty being to advance the amount directed. There is a passage in the judgment of the Lord Chief Baron in *Owen's Estate* indicating that his Lordship at that time entertained an opinion at variance with the views now expressed by me. Even a passing expression of opinion, on a point not discussed, coming from one of the greatest judges of this generation affects my mind with doubt. At the same time I am sure that that the Lord Chief Baron would be the foremost to insist that a Judge of first instance, having heard a case argued, should not allow his decision to be affected overmuch by an observation made in a case where the question was not argued, and did not directly arise. One thing is plain to my

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requiring an advance from the Land Commission of the whole or any part of the price you should fill in the annexed form of application." To the foregoing in the cases where the amounts had been increased by the Land Judge was added :—"I am, however, directed to call your attention to the fact that should an application be made by you, the Land Commission do not undertake to make an advance of the entire sum of Guaranteed Land Stock within mentioned."

All the tenants, except Denis Ward, accepted the offers, and signed the forms of application for advances of the sums specified.

On the 8th November, 1897, Mr. Commissioner Lynch, in the cases of the applications by Jonathan Bruce Massey (two), Bridget Mullins, Bridget O'Brien, William Cronin, and Michael Enright, made minutes or rulings that the Land Commission, not being satisfied as to the sufficiency of the security, refused the applications.

The Land Commission informed the solicitor having carriage

mind, that if the view of the Land Commission is a true one, the section is absolutely unworkable, and the attempt to work it will lead to injustice and mischief of a serious character. For so far everything seemed to me to point to the success of the policy initiated in this section. In the numerous cases that have come before me, the tenants, as a rule, assisted by most competent advisers are quite prepared, in consideration of the great benefits conferred on them by the section, to consent to fair prices being fixed. On the other hand, it must be admitted that landlords and incumbrancers have met them fairly, and have shown moderation and good sense. I believe that at the present time, having regard to the prices of Land Stock, it is possible to make them a fair compensation for the rent they part with, without exposing the public moneys advanced to any serious risk. But the unfortunate intrusion of the Commissioners' trusteeship has put an end to all this. I cannot entertain any hope that a Judge who will hear evidence, and who is at liberty to consider the general circumstances of the estate, would be likely to agree with the views of the two Commissioners, whose report depends upon another report of their inspector, who may be a stranger to the estate. From the way in which some of the estates have been dealt with, I can see no prospect of agreement in the future. They deal with the estate as if they were valuing for a timid lender of money. There are exceptions sometimes in cases where it is easy to collect the instalments. For example, some time ago I thought it right to lower the amount fixed in the case of a priest and curate, who were the tenants of agricultural holdings. I do not impute to the Commissioners any motive (of

that they would be prepared to advance the amounts of Guaranteed Land Stock applied for in the other cases.

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In re HARKNESS' ESTATE.

This was a rehearing by the Judicial Commissioner under section 41 of the Act of 1896, of the applications refused by Mr. Commissioner Lynch.

Matheson, Q.C., for the petitioners, having carriage.

BEWLEY, J.:—

Jan. 4.

The question in this case is one of enormous importance, affecting all proceedings taken under the 40th section of the Land Law (Ireland) Act, 1896. It has been argued on the part of the appellants that the Land Judge is empowered to fix in Guaranteed Land Stock the prices at which the holdings on an estate which is being sold under the provisions of the section are to be offered to the occupying tenants, and that when the tenants have accepted an offer based on such prices, the Land Commission are bound to

which they are conscious) except a desire to do their duty. But, after considerable experience, I cannot help feeling the force of what was said by the Master of the Rolls in *Owen's Estate* that we have "in reality a compulsory sale to a purchaser, who is to fix his own price." A great policy, such as initiated in this section, can never be successful, unless on the lines of justice and fair play to the landlord who sells, and the tenant who buys. If the Land Commission are right, it is my duty to call public attention to what must follow. In cases where the Land Judge is satisfied the amount suggested is too low, he must fix the price at a higher figure. Having no power over the stock, he must make the addition in cash. If the tenant accepts, he will be denuded of the capital which is necessary for the working of his farm, and the security on which the advance has been made will be in peril. In most cases the insufficient advance will render acceptance impossible; and yet, as the section is mandatory, the Court will be obliged to put the estate to the heavy expense of hearings on the request and report; the Land Commission must go on at great public expense inspecting and reporting, everybody knowing well that nothing is to come of it at all. The great mill must be kept working at immense expense to the landlords, the tenants, and the public, without producing anything of value. This is a state of things that is simply intolerable. My duty for the present is simply to give directions to the parties having carriage to take necessary steps in conjunction with the tenants, as they may be advised, at the cost of the estate, to take the case to her Majesty's Court of Appeal with the least possible delay. W. G.

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advance the amount of Guaranteed Land Stock named in the order of the Land Judge, even though they are satisfied that the holdings are not security for the advances.

That the Land Judge has the absolute right to fix the amount of the prices in such proceedings cannot be, and never was questioned, but that he has complete control over the amount of Guaranteed Land Stock to be advanced to the purchasing tenants is a very different matter.

This question appears to me to be one to be decided on an examination of some of the provisions of the Acts of Parliament constituting the Land Purchase Code.

By section 50, sub-section (4) of the Act of 1896, Part III. of that Act (in which section 40 is found) is to be construed as one with the Land Purchase Acts, as defined in section 48, sub-section (1). Under the definition referred to, the expression "Land Purchase Acts" means the Purchase of Land (Ireland) Act, 1891, the Land Purchase Acts as therein defined, and the Redemption of Rent (Ireland) Act, 1891; but for the purpose of the present case it is enough to say that the provisions of the 40th section of the Act of 1896 must be construed along with the Bright Clauses of the Landlord and Tenant (Ireland) Act, 1870, Part V. of the Land Act of 1881 (which deals with purchase), the Land Purchase Act of 1885 (commonly referred to as the Ashbourne Act), the Land Act of 1887, and the Land Purchase Act, and Redemption of Rent Act of 1891.

The Land Commission were constituted by the Land Act of 1881, and were given powers, partly of a judicial and partly of an administrative character. By section 24, sub-section (1) (being the first section in Part V. of the Act) it was enacted that "The Land Commission, out of moneys in their hands may, *if satisfied with the security*, advance sums to tenants for the purpose of enabling them to purchase their holdings as follows, that is to say:—(*a.*) Where a sale of a holding is about to be made by a landlord to a tenant in consideration of the payment of a principal sum, the Land Commission may advance to the tenant for the purposes of such purchase any sum not exceeding three-fourths of the said principal sum."

It will be seen that to give jurisdiction to make *any* advance

under the section, the Land Commission should be satisfied with the security. This provision was founded on section 44 of the Act of 1870, and section 1, sub-section (3) of the Amending Act, the Landlord and Tenant (Ireland) Act, 1872, under which the Board of Works, as the lending authority, was authorized to make certain advances to tenants to enable them to purchase their holdings *if the Board were satisfied with the security.*

To enable the Land Commission to judge of the sufficiency of the security, section 48, sub-section (4), of the Act of 1881, provided that "In determining any question relating to a holding, the Commission may direct an independent valuer to report to it his opinion on any matter the Commission may desire to refer to such valuer, such report to be accompanied with a statement, if so directed, of all such facts and circumstances as may be required for the purpose of enabling the Commission to form a judgment as to the subject-matter of such report. The Commission may or may not, as it thinks fit, adopt the report of such valuer."

The Ashbourne Act of 1885, amended and extended the powers given to the Land Commission by the Land Act of 1881, and, as its title indicated, provided greater facilities for the sale of land to occupying tenants in Ireland. Section 2 enacts that—"For enabling tenants to purchase their holdings either from the Land Commission or from the landlords of such holdings, the Land Commission may make advances under this Act out of any funds at their disposal. With respect to advances under this Act, the provisions of Part Five of the Land Law (Ireland) Act, 1881, shall be amended as follows—that is to say :—(*a*). The Land Commission may, if the repayment of the advance is secured by a deposit under this Act (hereinafter referred to as a guarantee deposit), and *if the Land Commission are satisfied with the security in other respects*, make an advance to a tenant who is purchasing his holding, of the whole principal sum or price payable by the tenant instead of the three-fourths thereof mentioned in Part Five of the Land Law (Ireland) Act, 1881."

Thus under this Act, as under the Act of 1881, that the Land Commission should be satisfied with the security is a condition precedent to making any advance.

Section 3 makes provision for the lodgment or retention of

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sums of money as a guarantee deposit to secure the repayment of advances made by the Land Commission, but under one of the clauses of that section the Land Commission could not apply the guarantee deposit in discharge or reduction of any arrears of such purchase annuity until they had made an order declaring it to be an irrecoverable debt; and such order could not be made unless having exercised any powers of sale of the holding which they might legally exercise, they had failed to realise by means of such sale the sum due to them secured on the holding, or unless it appeared by the order of the Land Commission that they had attempted to exercise such power of sale, and had been unable to do so. By the provisions of section 13 of the Land Act of 1887, no order could be made by the Land Commission declaring any sum due to them to be an irrecoverable debt until they had first attempted to enforce payment by action or civil-bill process, where there appeared to be a reasonable probability of the debt being recoverable by such proceedings.

Having regard to these provisions, as well as to other considerations, it is plain that the circumstances of a tenant seeking an advance to purchase his holding and his solvency must be important elements in estimating the sufficiency of the security for the advance. Hence the inspectors, as they are called, who were employed by the Land Commissioners specially appointed under the Act of 1885 to report on the holdings which were the subject of applications for advances, reported, not only on the value of the lands, but on the farming stock of the tenant and other matters that might aid the Commissioners in forming an opinion as to whether the instalments of the purchase annuity would be paid with regularity.

In order to enable tenants purchasing their holdings in the Land Judges' Court to obtain advances for the purpose under the Ashbourne Act, the 4th section of that Act provided:—"Where a holding is sold by the Land Judges to the tenant of that holding, the sale may, for the purpose of advances under this Act and of guarantee deposits under this Act, be deemed to be a sale by a landlord to a tenant."

When, therefore, a tenant of a holding on an estate subject to proceedings for sale in the Land Judges' Court had either been

declared the purchaser of his holding by the Judge, or proposed to offer to the Land Judge a certain sum for the purchase of such holding, and desired in either case to obtain an advance from the Land Commission to carry out the purchase, the holding was inspected in precisely the same manner as in the case of a sale by the landlord to a tenant, and though the price to be paid for the holding was wholly under the control of the Land Judge, the sufficiency of the security and the question as to whether an advance should be made or not, and, if made, what guarantee deposit should be required, were matters absolutely in the discretion of the Land Commission. If the Land Commission did not consider that the advance applied for would be adequately secured it would be refused, and either the proposed sale would become abortive or some modification would be made in the terms of purchase which would enable an advance to be safely made.

A large number of advances were made by the Land Commission for such purchases, and there was no friction between the Commission and the Land Judges' Court in carrying out the sales, each department keeping strictly within its own jurisdiction.

The Land Purchase Act of 1891 is a graft on the prior Land Purchase legislation. One of its principal objects was to supply the Land Commission with further funds for advances to tenants to enable them to purchase their holdings. Section 1, sub-section (1), provides that "Every advance under the Land Purchase Acts as amended by this Act, after the commencement of this Act . . . shall be made by the issue of a sum of Guaranteed Land Stock equal in nominal amount to the advance; such stock as between vendor and purchaser of the holding purchased shall be accepted by the vendor as equal in value to the nominal amount thereof."

And by section 15, sub-section (4), it is enacted that "Where any holdings on an estate are sold by the Land Judge to the tenants thereof or to the Land Commission, the Land Judge may accept in payment of the purchase-money Guaranteed Land Stock as equal in value to the nominal amount thereof."

After the passing of this Act, the Land Judge in selling to a tenant still sold for a price in cash, as it was not in his power to compel the tenant to apply to the Land Commission for any advance. If Guaranteed Land Stock were below par, as it was

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for some time after the passing of the Act of 1891, the Judge would, no doubt, name such a sum as if paid by an advance of Guaranteed Land Stock would have been a proper price for the holding. If, then, the Harkness estate had been sold to the occupying tenants by the Land Judge immediately prior to the passing of the Act of 1896, the ordinary procedure would have been as follows:—Each tenant requiring an advance from the Land Commission, having either come to terms with the solicitor having carriage of the proceedings as to the price, or having decided independently of any arrangement the sum that he would offer for his holding, would lodge in the Land Commission an application in Form 14, under Rule 20 of the Rules of August, 1891. An inspector of the Land Commission (who, under the Act of 1891, had become a permanent official appointed by the Lord Lieutenant, under the name of an Assistant Commissioner) would report to the Land Commission in Form 11, under the Rules referred to, and on a consideration of his report, the Commissioner to whom the matter had been referred would either sanction or refuse the advance applied for. If the advance were refused on the ground that the security was insufficient the tenant might propose to bring in a part of the purchase-money in cash and apply for a lesser advance, or the Land Judge might consent to sell the holding for a lesser sum than was originally contemplated. The amount of the price would be fixed by the Land Judge alone, but he had no voice whatever in determining whether an advance should be made or not. That was a matter entirely for the body entrusted by law with the lending of the money. The object of the Land Judge, naturally, would be to get as large a price as he could for the estate for the benefit of the incumbrancers and owner; but whether an advance by the Land Commission to enable a tenant to purchase would be adequately secured or not was a matter with which he had no concern.

Has, then, a total change been made in the functions of the Land Judge in these purchase transactions by the provision of section 40 of the Act of 1896? Is he the sole arbiter, not only of the price, but of the amount of the advance?

The object of the Legislature in enacting the provisions contained in the 40th section is too well known to require more than

a passing reference. The Land Judges' Court, instead of being a Court for the sale of estates, had become a gigantic rent office. Receivers were appointed over incumbered estates, as a matter of course, when a petition for sale had been filed. Elaborate and expensive preparations were made for a sale that every person knew would not take place, and when after some years the estate was put up for auction, there were usually no bidders, and the sale was adjourned *sine die*. The occupying tenants were the only persons likely to purchase, and rarely were any proper steps taken to negotiate with them with a view to sale. The receiver and the solicitor having carriage of the proceedings had a direct personal interest to let things remain as they were, and a forced sale would often be disastrous for the owner and the *puisne* incumbrancers.

Under these circumstances, the object of sub-section (1) of section 40 appears to be that the estates therein referred to, which are mainly insolvent estates, should either be withdrawn from the Land Judges' Court, or compulsorily sold, and that in the latter event the occupying tenants of agricultural or pastoral holdings should have a right of pre-emption. Under clause (*a*) of sub-section (1) the Land Commission, at the request of the Land Judge, are to cause the estate to be inspected, and a report to be made, by two Commissioners, respecting the estate, and the circumstances thereof, and the price at, and the conditions under which the sale of the holdings to the tenants under the Land Purchase Acts can properly be made.

The Land Commissioners have a staff of skilled valuers thoroughly competent to inspect these estates, and supply the Commissioners with such information as will enable them to report, not only the prices at which the sale of the holdings can properly be made, but the sums that can safely be advanced to carry out the sale. On the question of price, it is hardly necessary to observe, the Land Commission are perfectly impartial as between vendor and purchaser. On the question of advance, they are bound to look after the interests of those who would suffer if the purchase annuities were not paid, and to see that every advance is adequately secured.

Some persons would appear to think that it is the function of the Commission "to ladle out the Government money" to every

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one that applies for it in purchase transactions. There seems to be a vague notion that the advances are made in some way out of the Consolidated Fund, and that any loss will be spread over a wide area. But although the holders of Guaranteed Land Stock have the security of the Consolidated Fund for the punctual payment of their dividends, and for the ultimate redemption of their stock, and the taxpayers of the United Kingdom have thus an interest in the punctual payment of the purchase annuities, which have to provide the dividends on the stock and the sinking fund for its redemption, any loss that is occasioned by the inadequacy of security for payment of the purchase annuities must be mainly borne eventually by the ratepayers of the county in which the holdings are situate. It would be a mistake to suppose that the Land Commission always look upon a proper price as equivalent to the sum that can be safely advanced. Since the passing of the Redemption of Rent Act of 1891, the Commissioners have had ample experience in fixing prices that are wholly irrespective of the sums they have been willing to advance. Such prices have sometimes exceeded by many hundreds of pounds the amount of the advance. The prices which the Commissioners state in their reports under the 40th section are those which are in their opinion proper to be paid by the tenant for the interest sold to him, whether an advance is to be made or not. The notion that the prices are fixed by them on such a valuation as would be made by persons acting for a timid lender is a delusion.

I may remark *en passant* that the system of fixing such prices for all the purchasing tenants on an estate at a uniform rate of years' purchase of their rents is not adopted by the Land Commission, and would often lead to great injustice. To take but one illustration. Two tenants on the same estate may pay the same yearly rent. In one case, the tenant may be a present tenant within the meaning of the Land Law Acts, and all the buildings and other improvements on the holding may have been made by him or his predecessors in title. In the other case, the tenant may hold under a merely temporary letting made pending the matter, and all the buildings and other improvements may have been made or acquired by the landlord. It is plain that in the latter case, if the farms are similar in other respects, the interest of the tenant is

very much less valuable than in the former, and that a much larger price should be paid by him for the absolute fee-simple.

I now come to paragraph (*b*) of sub-section (1) of section 40. "The Land Judge after giving all parties, including the tenants, an opportunity of being heard, and considering the report and any offers that may be made for the purchase of the estate, or any part thereof, and any other matter, that may be brought before him, and the general circumstances of the estate, shall make to the person appearing to be in occupation as tenant of each holding on the estate an offer to sell to him the fee-simple of the holding discharged from the arrears of rent then due from him in respect thereof, at such price and subject to such conditions, whether as to the payment of part of the price in cash, or as to the offer to one tenant being conditional on the acceptance by other tenants of the offers made to them within a limited time or otherwise, as the Land Judge may consider reasonable and just, having regard to the interest of all persons interested in the estate."

If the owner or the incumbrancers on the one hand, or the tenants on the other hand, think that the Land Commission have erred in their estimate of the proper price in any particular case, I apprehend they can give evidence in support of their contention. If, for example, buildings or other improvements made or acquired by the landlord appear to have been treated as tenants' improvements, evidence can be given to correct the error.

The inspector of the Land Commission, in pursuance of Order XXXIX., R. 2, of the Land Purchase Rules of March, 1897, makes a careful and elaborate report as to each holding on a printed form, very similar to that used in purchase transactions between landlord and tenant, and although the Land Commission do not feel at liberty to give copies of these reports to the parties interested in the estate without the sanction of the Land Judge, there appears to be no objection to their doing so if that sanction is obtained.

When the Land Judge on the materials before him has fixed the price and conditions which are to be the basis of the offer, an order is made in pursuance of Order VII. of the Rules of January 23rd, 1897, and is transmitted to the Land Commission.

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By paragraph (*c*) of sub-section (1) of section 40, it is provided:—"The offer shall be communicated in such manner as the Land Commission think fit to the person appearing to be in occupation as tenant, and if it is accepted, then on fulfilment of the conditions the said person shall be deemed to have agreed to purchase the holding within the meaning of the Land Purchase Acts, and the sale shall be completed accordingly." In my opinion this enactment merely puts the purchasing tenant in the same position "as if he had agreed to purchase the holding within the meaning of the Land Purchase Acts." If he had so agreed the Land Commission would be the department to decide the amount of the advance, if any. The language, I think, has very much the same meaning as the closing paragraph of sect. 4 of the Ashbourne Act, to which I have already referred, which provides that "Where a holding is sold by the Land Judges to the tenant of that holding the sale may, for the purpose of advances under this Act and of guarantee deposits under this Act be deemed to be a sale by a landlord to a tenant." Whether the sale be under the last-mentioned section of the Act of 1885, or under the 40th section of the Act of 1896, the Land Commission, and the Land Commission alone, in my opinion, are to determine the amount of the advance and the amount of the guarantee deposit, if any. I find nothing in paragraph (*d*) of sub-section (1) of section 40 inconsistent with this. An order under that clause can have no greater effect, I think, than the acceptance of an offer under paragraph (*c*). It brings the tenant mentioned in it within the same category as the tenants who have accepted the offers of the Land Judge.

The view contended for by the appellants in the present case appears to me to be utterly at variance with the whole scope of the Land Purchase Acts, and would lead to the most extraordinary results. The claim put forward on behalf of the Land Judge to fix the amount of the advances to be made to purchasing tenants cannot be confined to the sale of insolvent estates, or the other estates coming within sub-section (1) of section 40, nor to cases of compulsory sale alone, but must apply also to other estates pending before him for sale, and to sales that are purely voluntary. The owner of a wholly unincumbered estate, after an absolute order for sale of it has been made, may apply to the Land

Judge under sub-section (3) of section 40 that the prior provisions of the section may be applied to the estate, and although if the estate were sold to the occupying tenants by the Land Judge under the provisions of the prior Land Purchase Acts, the amount of the advances to be made would be entirely in the discretion of the Land Commission, by bringing the case by his order within the first sub-section of section 40, the Land Judge, it is alleged, could insist on any advance he thought fit being made.

From the observations reported to have been made by Mr. Justice Ross on the 20th December last, in the present case, it would appear that he considered that when he, as a Judge of the High Court, had decided that certain sums of Guaranteed Land Stock should be advanced to the purchasing tenants, the Land Commission should have felt relieved from all responsibility in case the advances were inadequately secured. He says that for any ordinary tribunal his decision would have been sufficient, and he appears to charge the Land Commission with acting in defiance of the law, because they have not acquiesced in his decision. But if the Commissioners were of opinion—an opinion in which I, a Judge of the Supreme Court, entirely concur—that Mr. Justice Ross was acting outside his jurisdiction when he asserted a right to fix the amounts to be advanced by the Land Commission, and considered that such advances would be inadequately secured, ought they to have made the advances without even a remonstrance, and have left the unfortunate ratepayers of the county of Limerick—the county in which the Harkness estate is situate—when they were called on to pay a special county cess to meet the loss occasioned by non-payment of the purchase annuities, to the poor consolation that the advances to the defaulting tenant purchasers had been made under a decision of a Judge of the High Court? It is not a question of relieving the Land Commission from responsibility, but of safeguarding the interests of the ratepayers of Ireland.

I cannot understand how any objection could be reasonably taken to the fact that the Land Commission, when communicating the offers of the Land Judge in the present case to the occupying tenants, at the same time intimated to those tenants in whose case they considered an advance could not be safely made of the full

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amount of the price, that if an application were made to the Land Commission for an advance they did not undertake to make an advance of the entire sum of Guaranteed Land Stock mentioned in the offer. The offer to the tenants is communicated in a form settled by Mr. Justice Ross and myself, consisting of two distinct parts. The first page, which is intituled in the matter in the Land Judges' Court, contains the offer of the Land Judge to the tenant, and when accepted is signed at foot by the tenant. The second page, which is headed "Court of the Irish Land Commission," contains a form of application to be filled up and signed by the tenant whenever he requires an advance. In the fold of this document is the following notice:—"Sir, I am directed by the Irish Land Commission to communicate to you the within written offer for the sale to you of the fee-simple of the holding therein described, and request, in the event of your wishing to accept the offer, you do sign the acceptance thereof annexed. . . . In the event of your requiring an advance from the Land Commission of the whole or any part of the price, you should fill in the annexed form of application." And in the cases in which the Land Commission did not consider the full amount of the price could be advanced, a statement to that effect was added. The offer of the Land Judge was communicated to the tenants without the slightest addition or qualification; but the Land Commission, I think, would have been greatly to blame if they did not give the tenants, in the cases referred to, the earliest possible intimation that the full amount of the price might not be advanced.

But is the question involved in the present appeal so very plain that the Land Commission should have adopted Mr. Justice Ross's view of the law without hesitation? The various provisions of section 40 were very fully discussed by the members of the Court of Appeal in *In re Owen's Estate (No. 1)* (1). At p. 220 of the report the Master of the Rolls says:—"A question here arises: it would, perhaps, also arise even if the section had been held to be to some extent discretionary: viz. what is to be done if the price arrived at by the Land Judge is in excess of the

(1) [1897] 1 I. R. 200.

amount which the Land Commission is prepared to sanction? The offer, as I have said, is to be made by the Judge through the Land Commission. Can the Land Commission be called upon to offer a sum out of public money in excess of what they think reasonable? For I take it as clear, that if the offer be once made and accepted, it must be binding on all parties. Is the Land Judge to be at liberty, proceeding upon a report of the Land Commission as the chief, if not the sole, means of information before him, to overrule the Land Commission, and, at his sole discretion give away public money for nothing? Or again, is the offer to be limited, as to public money, to the sum reported by the Land Commission, and is the balance to be made up by the tenant?—a thing the Land Commission has very properly refused in many cases to sanction. Or is the offer to be wholly illusory? In practice, probably the Land Judge would feel himself bound not to exceed the limit of the money value fixed by the Land Commission. If he do exceed it, there may arise a very pretty question between him, and the Land Commission, and the Treasury." And at p. 241 the Lord Chief Baron says:—"I wish to say one or two words in reference to some of the remarks of the Master of the Rolls when he was giving judgment.

"I do not presume to become an apologist for this Act. I do no more than look through its provisions for the purpose of ascertaining the intention of the Legislature; and I do not conceive that I have any right, when I have once ascertained clearly what that intention is, to consider whether it imposes hardship upon particular classes. But there are one or two observations that were made which, I think, are not supported by the terms of the Act. The Master of the Rolls asks what is to happen, supposing the price at which the Land Commission fixes the value of the holdings, or of a particular holding, is a price less than the Land Judge indicates as being the price at which he will accept an offer. Well, in my mind, the Act of Parliament leaves no doubt whatever on the subject. The tribunal to fix the offer is the Land Judge; and if the Land Commission do not think proper to advance that amount to the tenant, and if the tenant is not able, by moneys of his own, to supplement the amount which he can obtain from the Land Commission, so as to be able to pay the

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price at which the Land Judge will accept him as purchaser, why, then, the offer cannot be accepted; and in my opinion, if an offer is made, and not accepted within a reasonable time, there is an end, so far as that holding is concerned, of this legislation, and the Land Judge is at liberty to sell the holding to anyone he thinks fit, in the way he would have sold it prior to the passing of the Act."

How are the views of this eminent Judge—whose clear and forcible judgments are cited with respect in every superior Court in England and Ireland—treated by Mr. Justice Ross? In the report of *In re Harkness' Estate* (1), at p. 432, the learned Judge, after stating the prices fixed by him in the present case, proceeds—"These offers must be communicated to the tenants by the Land Commission. If they are accepted, I am of opinion that the increased sum must be advanced by the Land Commission. Under certain circumstances, as, for instance, if I had any doubt about the security, I might order part of the price to be paid in cash. I have no doubt about it here. It follows that, in the words of the section, if the offer be accepted—'the sale shall be completed accordingly.' The contrary construction has been suggested that, if the Land Judge raises the price the Land Commission can fall back on the former valuation, and refuse to advance the increase, or that if the Land Judge compels the unwilling fourth of the tenants, under the powers contained in section 40, sub-section (1) (*d*), to buy, the Land Commission may refuse these tenants the wherewithal to buy. Such a construction would make the whole section a sham, and is contrary to its spirit and its words."

Are, then, the Land Commissioners to be described as acting in defiance of the law if they have expressed their intention to act on the Lord Chief Baron's views as to their powers and duties in connection with advances under section 40 of the Act of 1896, until these views have been overruled by some tribunal competent to do so? If the opinion of the Lord Chief Baron on this question should ultimately be decided to be erroneous I can only say for my part in the language of Cicero:—"*Errare mehercule malo cum Platone . . . quam cum istis vera sentire.*"

(1) [1897] 1 Ir. R. 426.

The only provisions in any Land Purchase Act that give jurisdiction to the Land Commission to advance the *whole* of the price to a tenant purchaser are contained in section 2 of the Ashbourne Act, and as the Act originally stood two conditions should be fulfilled before such an advance was made, viz.:—(1.) That the repayment of the advance should be secured by a guarantee deposit, and (2) That the Land Commission should be satisfied with the security in other respects. Under section 29 sub-section (1) of the Land Act of 1896, the Land Commission, on making an advance, may now dispense with the whole or any part of the guarantee deposit being made or retained, *if they think the security for the repayment of the advance is sufficient without it*; but the other condition remains, and I am clearly of opinion that there is no more jurisdiction to advance the whole price to a tenant purchaser where the Land Commission are not satisfied with the security than there is for them to advance a sum exceeding £5000, the limit imposed by the Land Purchase Act of 1888.

How important it is that in proceedings under the 40th section the sufficiency of the security should be a matter under the care of the Land Commission is, I think, sufficiently illustrated by what took place in the matter of *Odell's Estate*. The facts, which are uncontroverted, appear from a correspondence between the Secretary of the Land Commission and the Registrar of the Land Judges' Court. In a letter dated the 21st July, 1897, the Secretary of the Land Commission, after referring to some gross irregularities and errors in the request under the 40th section—the Land Commission, amongst other things, had been requested by the Land Judge to inspect and report on a number of holdings that had actually been purchased two or three years previously by the occupying tenants under the Land Purchase Acts—proceeded as follows:—"Another matter of still greater importance requires to be noticed. The circumstances of a tenant seeking an advance from the Land Commission to purchase his holding, constitute an important element in estimating the sufficiency of the security for the proposed advance. James Walsh, of Ballyduffmore, is tenant of two of the holdings included in the request in this matter, at rents amounting in the aggregate to £95 10*s*. Mr. Cunningham inspected these holdings on the 1st July, accompanied by the

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Receiver and the bailiff of the estate, and made the notes necessary for the preparation of his report thereon; but he has recently learned that ten days after his inspection the sheriff seized, under a decree or judgment for arrears of rent, all the tenant's stock, down to pigs of seven days old. It is quite impossible for the Land Commission to carry out their duties under section 40 of the recent Act if, after the holdings have been inspected on their behalf for the purpose of a report, the circumstances of any of the tenants are, by the action of the Receiver, materially changed by seizure of stock or crops for arrears of rent, or by the bringing or prosecution of proceedings in ejectment."

To that a reply, dated 26th July, 1897, was sent by the Registrar of the Land Judges' Court, which, after referring to the subject of the errors in the requisition, stated:—"On the other matter the Judge cannot enter into any discussion with the Commissioners on the subject of the propriety of proceedings for the recovery of rent, pending the sale. He cannot admit that the Commissioners or their inspector have any right to interfere in aid of tenants who, taking advantage of the pending request, refuse to pay their ordinary rents. It will probably tend to remove the difficulty of the Commissioners, in carrying out their duties under section 40, to be informed that all reports may be based on the assumption that payment of rent will be enforced until the completion of the sale."

On the 27th of July, 1897, the Commissioners, through their Secretary, wrote again as follows:—"*Odell's Estate.* Sir,—Referring to your letter of the 26th inst., I am directed by the Irish Land Commissioners to express their regret that Mr. Justice Ross should have entirely misapprehended their object in calling attention to the case of James Walsh, on this estate. You state that 'he cannot admit that the Commissioners or their inspectors have any right to interfere in aid of tenants who, taking advantage of the pending request, refuse to pay their ordinary rents.' The Commissioners have not sought in any way to interfere in aid of tenants as suggested. They are, however, bound, in the interest of the State, to see that the moneys advanced under the Land Purchase Acts for the purchase of holdings are adequately secured, and they have endeavoured to impress on Mr. Justice Ross that the

circumstances of a tenant constitute a material element in estimating the sufficiency of the security for a proposed advance, and that if, after the date of inspection for the purpose of a report under the 40th section, all a tenant's stock and crops are seized and sold, and the sale of the holding is afterwards completed on the recommendations contained in the Commissioners' report, and without any notification to them of the alteration in the circumstances of the tenant, the advance will have been made on a mistaken basis, and the security for the purchase annuity will, in many cases, be seriously imperilled. The Commissioners note that Mr. Justice Ross wishes them to be informed that all reports under the 40th section may be based on the assumption that payment of rent will be enforced until the completion of the sale; but they have to request that, if after their report has been made, or after the holdings have been inspected for the purpose of that report, active proceedings are taken to enforce payment of all arrears of rent due by any tenant, an intimation may be given to them that they may have an opportunity of considering whether they can, with safety, make the advance proposed.—I am, sir, your obedient servant, J. H. FRANKS." And on the 29th the correspondence was closed by the following letter from the Registrar of the Land Judges' Court:—"*Odell's Estate.* Sir,—In reply to your letter of the 27th inst., I am directed to say that Mr. Justice Ross cannot lend any countenance to the view that the Commissioners are at liberty, after their report has been made and acted on, to consider whether they will make the advance or not. He cannot undertake to supply them with the information required.—I am, your obedient servant, J. M. KENNEDY, Registrar."

I shall restrain myself from criticising the tone of the letters of the Registrar. The most cursory reading of them will show what difficulties the Land Commission have to encounter in carrying out their important and arduous duties under the 40th section.

The Land Judge claims not only the right to fix the prices of the purchasing tenants, and the amounts that are to be advanced to them by the Land Commission, but also, in his capacity of Receiver Judge, after the report of the Commissioners has been made, to sweep off the holding, if necessary, all the tenant's farming stock and implements for payment of arrears of rent, and to allow, or

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rather compel, the Land Commission, without any knowledge of the facts, to make the advance to a tenant who is practically a pauper, and who will probably fail to pay the very first instalment of the purchase annuity.

Can this be the intention of the Legislature? Is the Judge who has no skilled valuers attached to his Court, who, judging by the report of *In re Harkness' Estate*, contained in [1897] 1 I. R. 426, increased the prices recommended in the report of the Land Commissioners, without any evidence of value (for I cannot consider the affidavit of the owner as such), and mainly, as it would appear, on the result of a conversation with the Receiver, also entitled to compel the Land Commission to make such advance to the purchasing tenant as he thinks fit, notwithstanding that his Receiver, after the price has been fixed, has destroyed or imperilled the security?

Was it intended, under a provision entitling the Land Judge, after giving the parties an opportunity of being heard, and considering the report of the Land Commission, to make to the person appearing to be in occupation as tenant an offer to sell to him the fee-simple of his holding, discharged from the arrears of rent then due from him in respect thereof, that the Judge should have power to tack all arrears of rent to the price, and treat them as part of the purchase-money of the fee-simple? In the present case these arrears, which are constituted part of the price, are to be paid in cash; but in other cases the Land Judge appears to have included the arrears in the sum of Guaranteed Land Stock named as the price, and, by his action, to have claimed that the State funds, intended to pay for the acquisition of the fee-simple by the tenants, should be applied also in discharge of arrears of rent, that, from the remissness of the Receiver, or other causes, have remained unpaid?

I cannot believe that the Legislature had any such intention.

One other matter requires to be referred to. The effect of Mr. Matheson's argument would apparently amount to this, that when the tenants have accepted the offers of the Land Judge under section 40 the duties of the Land Commission in making the advances would be purely administrative or ministerial. If that be so, there is no reason apparently why a Commissioner should

take part in this stage of the proceedings, and if he does his action in directing the advances to be made is in no sense judicial. If Mr. Matheson's contention be correct, it would appear to follow that the minute in the present case indorsed on the application for an advance, viz., "The Land Commission not being satisfied as to the sufficiency of the security, doth refuse the tenant's application," signed by Mr. Commissioner Lynch, does not constitute an "order" within the meaning of section 41 of the Act of 1896, and, if so, the present appeal would be unsustainable. Various administrative duties are entrusted to the several Land Commissioners, but their minutes in reference to them do not amount to orders, and are not the subject of an appeal. For example, an application may be made by a tenant purchaser for leave to sub-divide his holding, and if a Commissioner to whom the matter is referred should make a minute on the application to the effect that the Land Commission refuse to consent to the proposed sub-division, it could hardly be contended, I think, that this was an order from which an appeal could be taken.

If no appeal lies, the proper remedy of the appellants would appear to be by mandamus, a much more convenient course in many respects, as the Land Commission could show cause against the conditional order for the mandamus, and be heard by counsel both in the Queen's Bench Division and in the Court of Appeal. If an appeal is taken to the Court of Appeal in the present case, it will be practically an *ex parte* proceeding, and the Court may not have the advantage of having a full discussion of many matters which, in the view of the Land Commission, are material for the proper decision of the case.

In my opinion the discretion of the Land Commission in making advances to purchasing tenants has not been taken away by the 40th section of the Act of 1896 in respect of purchases under that section, and the present appeal must be dismissed.

D. M'C. M.

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Jan. 25–28. Feb. 18.

Messrs. Cox and Co., the incumbrancers who had carriage of the sale, appealed to the Court of Appeal (Lord Ashbourne, C., Sir Peter O'Brien, L.C.J., Porter, M.R., Palles, C.B., and Fitz Gibbon, Walker, and Holmes, L.JJ.).

Ronan, Q.C., and *Matheson, Q.C.* (with them *Charles Brady*), for the appellant:—

Under section 40 of the Land Law (Ireland) Act, 1896, the Land Judge is the final and absolute arbiter of all the conditions of the sale where lands are offered to the tenants under that section. During the argument before Mr. Justice Bewley, that learned Judge seems to have thought that the order which the Land Judge made was *ultra vires* in so far as it directed the offer to be made to the tenants at a price to be paid in land stock: the judgment, however, proceeds on different grounds. There is no question that the Land Judge had power to make the price which the tenants were to pay payable in land stock. By sub-sect. (1) par. (*b*) of section 40 "The Land Judge . . . shall make to the . . . tenant . . . an offer to sell to him the fee-simple of the holding . . . at such price, and subject to such conditions, whether *as to the payment of part of the price in cash* . . . or otherwise, as the Land Judge may consider reasonable and just." The Land Judge must fix the total price of the holding, with a discretion as to fixing part in cash. The residue must therefore be fixed in land stock. The sub-clause gives the Judge a discretionary power to fix part of the price in cash: the main clause enables him to sell at such price in land stock as he thinks just. The Land Judge had been previously given power to accept land stock in payment of the purchase-money of holdings sold to tenants on an estate: sect. 15, sub-sect. (4), Purchase of Land (Ireland) Act, 1891. Nor can there be any difficulty in the way of the tenant procuring land stock with which to pay his purchase-money, because the Land Commission have to issue all such land stock as is required for the purpose of the Land Purchase Acts under sect. 15, sub-sect. (1), Purchase of Land (Ireland) Act, 1891.

When the Land Judge has fixed the price—be it in land stock, or partly in land stock and partly in cash—and the conditions, the

Land Commission (sub-sect. (1), par. (*c*), sect. 40), are to communicate the offer to the tenants: but there is no power given to the Land Commission to vary the offer. Then (sub-sect. (1), par. (*c*), sect. 40) if the offer be accepted, on fulfilment of the conditions the tenant "shall be deemed to have agreed to purchase the holding within the meaning of the Land Purchase Acts, *and the sale shall be completed accordingly.*" These last words are plainly mandatory, and the only construction which can be given to them shows that from the moment the tenant accepts the offer and fulfils the conditions made and imposed by the Land Judge, there is a binding contract for sale between the Land Judge and the tenant. The only duty imposed on, or power given to, the Land Commission in respect of the offer is to communicate it "in such manner as the Land Commission think fit to the person appearing to be in occupation as tenant." These words can only refer to the mode of communication, and do not confer on the Land Commission any power to add to, vary, or retrench from the offer prescribed by the Land Judge. Yet in the present case when the officer of the Land Commission communicated the offer to the tenants he wrote in the fold of the document in which it was contained: "I am, however, directed to call your attention to the fact that should application be made by you the Land Commission do not undertake to make an advance to the entire amount of guaranteed land stock therein mentioned." The Land Commission had no power to put this tack upon the offer of the Land Judge: it virtually amounts to a statement that the offer of the Land Judge is illusory unless the Land Commission think fit to adopt that portion of it which provides "for the payment of the purchase-money in guaranteed land stock." The words "the sale shall be completed accordingly" are mandatory. They imply that the advance of guaranteed land stock necessary for the purpose of the offer made by the Land Judge and accepted by the tenant shall not be refused. Compare the language of section 35, which contrasts as the only two possible alternatives, "the event of the sale being carried out," and the event of the "advance being refused."

The wording of clause (*b*) shows that when it gave the Land Judge power if necessary to fix part of the price in cash, the

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Legislature contemplated that normally the price would be fixed by the Land Judge in something else, viz. land stock.

The proviso in clause (*d*) is of vital importance: it enacts that the order of the Land Judge binding the reluctant tenants shall not apply to any tenant who cannot by the existing law, if purchasing voluntarily, get an advance for the whole of his purchase-money. Thus we have the same restriction upon the power to advance of the Land Judge in compulsory sales as we have upon the power to advance of the Land Commission in voluntary sales: 51 & 52 Vict. c. 49, s. 2. The obvious inference is that the Land Judge is to exercise within the limits of this restriction the discretionary power given him by clause (*d*) to order the reluctant tenants to be deemed to have accepted the offers. The Legislature is only dealing with cases where "purchase-money" and "amount of advance" are synonymous. It would be contrary to all one's notions of right of freedom to give power to a Judge to declare that a tenant should be deemed to have contracted to pay money. But this objection does not lie to a construction of the enactment which enables the Judge to provide the means of payment and then to make an order which merely changes the status of the person whom he deems to have accepted the offer.

Section 40 is self contained: it prescribes all the regulations under which sales under the section are to be carried out. Before the Land Judge makes the offer to sell he has before him the report of the two Commissioners respecting the estate, and the circumstances thereof and the price at and the conditions under which the sale can properly be made under the Land Purchase Acts: he gives all parties, including the tenants, an opportunity of being heard; he considers the report and any offers that may be made for the purchase of the estate, and makes the fullest investigation into the circumstances before he fixes the price and makes the offer to the tenants: nay more, there is an appeal from his decision in the matter to this Court, and yet it is said that the order made by the Land Judge after such an investigation, possibly even affirmed by this Court, is liable to be rendered nugatory by one of the Land Purchase Commissioners refusing to sanction the advance necessary for completing the sale.

The Attorney-General (*The Right Hon. J. Atkinson, Q.C.*), and *Wright, Q.C.* (with them *Morphy*), for the Treasury, who had obtained leave to intervene on the appeal:—

The Land Judge exceeded his jurisdiction when he fixed the amount of the advance to be made to the tenants. This jurisdiction belongs solely to the Land Commission. The limitations which regulate the amount of advances under the Land Purchase Acts and the amounts available in the different counties are entirely matters for the Land Commission. They alone are cognizant of such matters: 54 & 55 Vict. c. 48, sects. 9, 10, 11. The amount of the guarantee deposit and the question whether the guarantee deposit *may* be dispensed with are purely for the Land Commission: 48 & 49 Vict. c. 73, sects. 2, 3; 59 & 60 Vict. c. 47, s. 29. Bewley, J., has pointed out, going through the whole Land Purchase Code, that Parliament has given the power to the Land Commission to make advances to purchasing tenants only in cases where that body is "satisfied with the security." The whole code shows that there is concentrated in one body—the Land Commission—four several functions outside the province of the Land Judge: *e.g.*—1, to determine the amount of the advance; 2, to have regard to the county fund; 3, to be satisfied with the security; 4, to determine the amount of the guarantee deposit. There is nothing in section 40 of the Act of 1896 to take away this jurisdiction from the Land Commission. That section can be read in complete harmony with the previous Acts, leaving to the Land Commission the power to fix the amount of the advance and to determine all questions as to the guarantee deposit. Under clause (*a*), the Land Commission can intimate to the Land Judge the two matters which are in their exclusive jurisdiction, *e.g.* the amount of the advance and the amount of the guarantee deposit unless it be dispensed with. Under clause (*c*) the Land Judge will consider these matters (amongst others), and if he thinks right to fix the price at a figure exceeding the amount of the advance which the Land Commissioners' report sanctions, he can fix that part of the price which exceeds the advance in cash: the wording of the section is expressly framed to meet such a case. The Land Commission make their determination as to the advance and the deposit by their report: possibly that determination may be

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modified by a supplemental report furnished before the Land Judge fixes the price: but the determination is irrevocable once the offer is made. Bewley, J., is wrong if he claims that the Land Commission can reconsider the amount of the advance or of the deposit in the event of the Land Judge requiring a cash payment from the tenant as part of the purchase-money. By friendly interchanges of opinion between the Land Judge and the Land Commission the whole section can be worked smoothly.

Ronan, in reply:—

Previous to the passing of the Act of 1896, the approval of the Land Commission to the sanction of an advance had to be signified by an "order": 51 & 52 Vict. c. 49. s. 3. Since the passing of the Act, it is to be signified by a minute or order in writing signed by the Commissioner making it: Order XV., Rule 1. This order is subject to the right of appeal provided by section 22 of 48 & 49 Vict. c. 73, and section 41 of 59 & 60 Vict. c. 47. The argument of the Attorney-General would substitute for this "order" a report made by two Commissioners on the inspection of a valuer; and this report, not even a final matter, but capable of modification by an informal conversation between the Land Judge and the two Commissioners! It is impossible that the Legislature could have intended to leave the decision as to the amount of the advance to be settled in such a manner. The "report" of the Land Commission *ex vi termini* is not a decision, but is something furnished to the Land Judge, by means of which, along with other matters, *he* is to make the decision. It is plain that the construction of the section adopted by the Attorney-General is wholly inconsistent with the view taken by Bewley, J. The very order now appealed from was made by him on an appeal taken from Mr. Commissioner Lynch, to whom application was made to sanction the advance of the land stock after the Land Judge made the offer, and of course long subsequent to the "report" furnished to the Land Judge. Again, Bewley, J., plainly intimates that in his opinion the Land Commission have power to reconsider the position taken up by them in their report in the event of the Land Judge putting an increase in cash upon the price in land stock which the Land Commission would advance.

This view is in accordance with the practice of the Land Commission, and is based on the ground that the "circumstances" of the purchasing tenant and his capacity to pay the annuity necessarily form part of the security. On the argument of the Attorney-General no change can be made by the Land Commission regarding the security they require once the report is made. We submit that the view of Bewley, J., as to the circumstances of the tenant affecting the security is sound; and we say that the fact that the Land Judge can require a cash payment which affects the tenant's circumstances, shows that the Land Judge is given power to interfere with the security for the advance. In opening the appeal we showed that the Land Commission had no power to vary the Land Judge's offer by fixing a different amount of land stock as the amount to be advanced to the tenants. We have now shown that the Land Commission has no power to fix the amount of the advance before the offer of the Land Judge. The only remaining possible course is that for which we contend, the Land Judge alone has the power, in cases under the 40th section, to fix the amount of the advance, and he exercises this power when he makes the offer, which he does by a judicial determination of a solemn kind.

In this case no question arises with reference to the guarantee deposit. The procedure under the 40th section does not go beyond the completion of the sale. The power given to the Land Commission to require or dispense with a guarantee deposit arises at a subsequent period, viz. "on making an advance," 59 & 60 Vict. c. 47, s. 29.

LORD ASHBOURNE, C.:— Feb. 18.

This is an appeal from an order of Mr. Justice Bewley, and raises important questions on the construction of section 40 of the Irish Land Act of 1896, and involves the ascertainment of the jurisdiction which is to measure and direct the amount to be advanced from the public funds for sales under that section.

The case has been argued with conspicuous ability on both sides, and we feel that we have been given all the aid that counsel could afford to assist us to a legal and sound conclusion.

It is absolutely essential to have clear views of the Land

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Purchase Code, its provision and its development, before considering the section in controversy. That section must be construed along with the Bright Clauses of the Landlord and Tenant (Ireland) Act, 1870; Part 5 (which deals with purchase) of the Irish Land Act of 1881; the Land Purchase Act of 1885; the Land Act of 1887; the Land Purchase Act, 1891; and the Redemption of Rent Act of the same year.

By section 44 of the Act of 1870, and section 1, sub-section 3, of the Amending Act of 1872, the Board of Works were authorized to make advances of two-thirds of the purchase-money to tenants, to enable them to purchase their holdings, *if the Board were satisfied with the security.*

By section 24 of the Land Act of 1881, it is enacted that "the Land Commission, out of moneys in their hands, may, *if satisfied with the security*, advance sums to tenants, for the purpose of enabling them to purchase their holdings," not exceeding three-fourths of the purchase-money. To enable the Land Commission to judge of the sufficiency of the security, section 48, sub-section 4, provided that "in determining any question relating to the holding, the Commission may direct an independent valuer to report" on any matter referred to him.

The Act of 1885 (commonly called the Ashbourne Act) made a substantial advance on the previous Acts, and provided greater facilities for the sale of land to occupying tenants. Section 2 enacted that "the Land Commission may, if the repayment of the advance is secured by a guarantee deposit, and, *if the Land Commission are satisfied with the security in other respects*, make an advance to a tenant who is purchasing his holding, of the whole principal sum or price payable by the tenant, instead of the three-fourths mentioned in the Act of 1881." It is important to note that the 4th section of the Act of 1885 enables tenants purchasing their holdings in the Land Judge's Court to obtain advances for the purpose from the Land Commission, and uses the words, "where a holding is sold by the Land Judges to the tenant of that holding, the sale may, for the purposes of advances under this Act, be deemed to be a sale by a landlord to a tenant." The price the tenant should pay was under the control of the Land Judge, but the amount of the advance was left to the discretion

of the Land Commission. The Land Commission would refuse an advance they did not think sufficiently secured, and the system worked without any difficulty. Mr. Justice Bewley in his able judgment says:—"A large number of advances were made by the Land Commission for such purposes, and there was no friction between the Commission and the Land Judge's Court in carrying out the sales, each department keeping strictly within its own jurisdiction."

The Land Purchase Act, 1891, carried on the legislation of 1885; and maintained the power of the Land Commission to advance the whole purchase-money, if satisfied with the security, a guarantee deposit being retained. The Act provided that all future advances under the Land Purchase Acts should be by the issue of Guaranteed Land Stock, and the claims of each county to advances were measured, and the risk of loss was distributed, and safe-guarded by careful provisions.

The Land Act of 1896 further developed the code, and it is expressly provided in section 29 that "the Land Commission on making an advance, may dispense with the whole, or any part, of the guarantee deposit being made or retained, *if they think the security for the repayment of the advance is sufficient without it.*" This is a most important provision, for the guarantee deposit plays a very large part in the Land Purchase Code. It would not have been possible to pass the Purchase Act of 1885 without the enactment relating to the guarantee deposit. This system pivoted on this deposit, and therefore section 29 made a forward move in enacting that the Land Commission might dispense with the whole or part of the guarantee deposit, but it takes cautious care to point out that the Land Commission can only dispense with the deposit "if they think the security for the repayment of the advance is sufficient without it."

Then comes section 40, which seeks to deal with the congested condition of the Land Court, blocked and occupied with a vast number of heavily encumbered estates—for years under receivers—and for which there was no apparent prospect of sale. The receiver jurisdiction was in abnormal development, whilst the land and sale jurisdiction was in slender operation. The section seeks to deal with this state of facts by directing the Land Judge to take the

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initiative, instead of leaving it to the tenants, who had heretofore done nothing, and who might not know anything of the Purchase Acts, or their facilities or advantages. Heretofore, under the Code, the tenant had been obliged to approach the Land Commission for an advance to carry out a sale, which he had already agreed on. Now, it was provided that the Land Judge should make the first move, request the Land Commission to inspect, and report the conditions under which a sale could properly be made; then he was to fix a price, after which the Land Commission was to make the offer to the tenant, and if the tenant accepted, then the sale was to be completed under the Land Purchase Acts.

The important question raised in this case is—does this section work a complete change in the functions of the Land Judge; is he given not only control over the price, but sole jurisdiction over the amount of the advance? Is the Land Commission entirely divested of their responsibility and made a mere ministerial messenger of the Land Judge? If this is so, it is manifest that the change is a very great one, wholly inconsistent with the uniform action of the Legislature in every Act of the Code,—a change not to be lightly imputed, or without words of clear import.

Before examining the words of the section, it must be steadily borne in mind, that every single Purchase Act, without exception, in terms requires the body which sanctions the advance it authorizes to be "satisfied with the security." That is already the duty of the Land Commission under the Code. It is not the duty of the Land Judge, nor does section 40 hint at imposing any such obligation on him. Therefore if the section transfers from the Land Commission to him the power of measuring the advance, without a syllable to suggest that he should be satisfied with the security; it has without apparent reason, departed from the settled, uniform, consistent, and wise practice of every Land Purchase Act. It must also be kept in view that the vast power of measuring, retaining, or dispensing with the great security of the guarantee deposit, rests absolutely with the Land Commission, no matter what may be the construction on other points given to section 40.

What is the section, and where is the difficulty of reading it so as to make it harmonize on this subject with all existing legislation,

and work smoothly and without friction, as under earlier statutes when the Land Judge fixed the price and the Land Commission measured the advance? The section begins (after the preliminary conditions) with sub-section (1), (*a*) as follows:—"The Land Commission shall, at the request of the Land Judge, cause the estate to be inspected, and a report to be made by two Commissioners respecting the estate and the circumstances thereof, and the price at, and the conditions under which, the sale of the holdings to the tenants under the Land Purchase Acts can properly be made."

The argument of the appellants is that the Land Commission is merely ministerial, a mere messenger, that the Land Judge is the *Dominus* all through. Then, why is the Land Commission brought into the matter at all? Why must there be two of the head Land Commissioners? Why not send on the Inspector's report direct to the Land Judge? The two Land Commissioners are named—and not one—because they are asked to exercise their ordinary and familiar jurisdiction under somewhat novel circumstances, to name in advance the conditions under which the sale of holdings to tenants under the Purchase Acts can *properly* be made. Their judgment is assisted by their own wide and trained experience, by their Inspector's report, and also by the rental and the receiver's last account, which under the rules must be sent with the request. For ordinary sales the Inspectors would be asked to report whether the lands would be security for the advance asked for; but under section 40 the duty of measuring the amount which has not been asked for, but that might be safely advanced, is reserved for the two Land Commissioners. The conditions under which a sale could properly be made would include a statement of the amount of advance which could be properly made, having regard to the security; and also a statement of the amount they estimated should be retained for guarantee deposit. These two Commissioners fulfil an important and special statutable duty, and forward under their hands a report which they know is going to be acted on, and a representation as to the advance which they know is vital to the transaction. The report goes to the Land Judge who can also, as in this case, see the Inspector's report, and then his duty is stated in sub-section (1), (*b*): "The Land Judge, after giving all parties, including the tenants, an oppor-

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tunity of being heard, and considering the report and any offers that may be made for the purchase of the estate or any part thereof, and any other matters that may be brought before him, and the general circumstances of the estate, shall make to the person appearing to be in occupation as tenant of each holding on the estate, an offer to sell to him the fee-simple of the holding, discharged from the arrears of rent then due from him in respect thereof, at such price, and subject to such conditions whether as to the payment of part of the price in cash, or as to the offer to one tenant being conditional on the acceptance by other tenants of the offers made to them within a limited time, or otherwise, as the Land Judge may consider reasonable and just, having regard to the interest of all persons interested in the estate."

This sub-section constitutes the Land Judge the sole jurisdiction to fix the price, directing his attention to all the matters and interests he should consider. He has before him the report of the two Land Commissioners. It does not bind him as to price, and he is given express jurisdiction to fix part of the price in cash to meet the case of the price he fixes exceeding the amount of advance specified in the report, and to enable him to provide for the payment of the difference. Nothing is said about land stock in the section, which leaves it quite open to the tenant to pay the whole or any part of the price in cash; but it may be readily assumed that all or the great majority of the tenants would apply for an advance of the entire purchase-money. It is necessary to give the Land Judge express power, for the reason I have stated, to fix part of the price in cash, but if he seeks to fix the balance in land stock, unless qualified or explained, it may lead to difficulties and misconceptions on the part of the tenant. The discretion of the Land Judge as to price is unbounded; but he should, as a matter of prudence, have due and fair regard to the amount that the Land Commission will advance, as the tenant may not be able or willing to pay the excess in cash. The power, however, of fixing the price is of the highest importance, as, if the Land Commission are too low in their estimate, the Land Judge may, in fixing the price, safeguard some interests, and possibly lead, on further consideration by the Land Commission, to a more liberal advance. The conditions placed in the power of the Land Judge do not, in my opinion, include any right whatever to measure

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the amount of the advance or the guarantee deposit. The section then proceeds (1), (*c*) :—"The offer shall be communicated in such manner as the Land Commission think fit to the person appearing to be in occupation as tenant; and if it is accepted, then, on fulfilment of the conditions, the said person shall be deemed to have agreed to purchase the holding within the meaning of the Land Purchase Acts, and the sale shall be completed accordingly."

The Land Commission are again brought in to communicate the offer as they think fit, and then, if the offer is accepted and the conditions fulfilled, the person shall be deemed to "have agreed to purchase the holding within the meaning of the Land Purchase Acts."

It is impossible to conceive a section which more prominently recognises the Land Commission, and which more consistently keeps in view the Land Purchase Acts. There is everything to show that the jurisdiction, power, and discretion of the Land Commission is steadily kept in view, and everything to negative the suggestion that it was intended to reduce the Commission from the position of guardians of the security of public money to that of a ministerial attendant on the Land Judge, to obey his orders, and be his messenger. At the beginning of the section the Land Purchase Acts are invoked to supply the conditions under which the sales could properly be made, and then in the later sub-section (*c*), when the tenant accepts and the conditions are fulfilled, he is deemed to have agreed to purchase within the meaning of the Land Purchase Acts. The words following, "and the sale shall be completed *accordingly*," accentuate the fact that the sale should be completed according to the Land Purchase Acts. That was the course adopted in this very case. The tenants applied to the Land Commission to sanction the advance of the sums named by Mr. Justice Ross as the prices. Mr. Commissioner Lynch refused to advance the sums asked for, and the parties elected to appeal from his decision to the Judicial Commissioner. They never ventured to rely upon the order of Mr. Justice Ross as sufficient of itself to command the advance or capable of being enforced without the sanction of the Land Commission as to the security.

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It would be contrary to the meaning of the whole Land Purchase Code, to take away or attenuate the jurisdiction of the Land Commission, which it has been the steady object of the code to strengthen and assure as the guardians of the advance of public money. Would it not be incongruous and contradictory to construe the section as giving the Land Judge the jurisdiction to order what advance he thought proper, whilst it denies him all power over the guarantee deposit? If the contention of the appellants is well-founded, the Land Commission would be stripped of the power of measuring the advance, and at the same time left unfettered jurisdiction over the guarantee deposit, which might prevent the payment for years of the sum which the Land Judge wished to have advanced.

I think that the Land Judge has no power whatever to regulate the amount of the advance, or to deal with the guarantee deposit, and that the power remains, as heretofore, with the Land Commission; and I am satisfied that when this important question of jurisdiction has been authoritatively settled by the order of this Court, the learned Judges of the High Court, who preside over those most important tribunals, will combine to establish the harmonious and efficient working of this clause. I do not think it wise or expedient to hamper them by too dogmatic statements as to the machinery of the section. The rules made last year enable the Land Judge to ask for a further report; and I can see no reason why the two great land jurisdictions should not, when they think fit, freely communicate with one another, brought as the Judges are into such close relations, as colleagues, by section 23 of the Act of 1896. If the Land Judge, after full consideration, thinks that the Land Commission have named too low an advance, I see no reason why he should hesitate to communicate his opinion to the Land Commission, or why the Land Commission, if they think a fair case is made, and that the security would warrant it, should not, in proper cases, reconsider the amount of the advance with a view to increasing it.

After the fullest and most careful consideration of the case I have arrived at the clear conclusion that the order of Mr. Justice Bewley was right, and should be affirmed.

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Mr. Justice Bewley concludes his judgment, which is now under appeal, in these words:—"In my opinion, the discretion of the Land Commission in making advances to purchasing tenants has not been taken away by the 40th section of the Act of 1896 in respect of purchases under that section." Was the learned judge right or wrong in that opinion? Have the Land Commission a discretion to make or withhold the advance according as they are or are not satisfied with the security? This is the question we have to decide. I shall deal with it by considering what the state of the law was before the Act of 1896; by reference to any relevant section in the Act up to, but exclusive of, the 40th section; by reference to the language of the 40th section itself: and by reference to any section subsequent to the 40th section, which, in my opinion, affords help in ascertaining the true construction of the 40th section. My consideration of the case will accordingly range itself under four heads—First, the state of the law prior to the Act of 1896; secondly, the bearing on the subject of controversy of the sections of the Act up to the 40th section; thirdly, the language of the 40th section itself; and, fourthly, the guidance to be derived (if any) from the sections subsequent to the 40th section. As to the first head—that is to say, the state of the law prior to the Act of 1896—there is not, nor could there be, any controversy. It was a condition of getting the advance that the department which made the advance, originally the Board of Works, and afterwards the Land Commission, should be satisfied with the security. This is expressly provided in all the antecedent Purchase Acts. Up to the Act of 1885, which is known as the Ashbourne Act, only a certain proportion of the purchase-money could be advanced; but that Act provided that if the payment of the advance was secured by a guarantee deposit, and if the Land Commission were satisfied with the security in other respects, the whole purchase-money might be advanced. To the power to advance the entire purchase-money is ascribable, in my opinion, the successful working of that Act; but it is to be noted that what was called a guarantee deposit was a necessary condition of getting the advance. There were, in fact, two conditions necessary—that there should be a guarantee deposit, and that

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the Land Commission should be satisfied with the security. The guarantee deposit was not to be less than one-fifth of the advance, and might be provided by the purchasing tenant depositing the necessary sum with the Land Commission, or by the landlord permitting the retention of it out of the purchase-money. By the 23rd section of the Land Purchase Act of 1891, in every case of an advance exceeding three-fourths of the purchase-money of a holding, it was made imperative on the Land Commission to retain a guarantee deposit out of the advance unless it was otherwise provided. Before the Act, then, of 1896 it was a necessary condition of obtaining the advance that the Land Commission should be satisfied as to the sufficiency of the security, and that a guarantee deposit should be retained.

I now come to the Act of 1896, and I find in its 29th section this important clause. The words are as follows:—"The Land Commission, on making an advance, may dispense with the whole or any part of the guarantee deposit being made or retained *if they think the security for the payment of the advance is sufficient without it.*" What is the meaning and effect of this clause? Does it not clearly mean that the Land Commission shall have power to dispense with the guarantee deposit, and that the power to make the advance shall remain with the Land Commission according as they are or are not satisfied with the sufficiency of the security? This is absolutely plain. The 29th section of the Act of 1896 simply amends the 2nd section of the Act of 1885, and the effect of both Acts is to confer a twofold discretion on the Land Commission, to dispense with the guarantee deposit, and to make the advance if they are satisfied with the security. And it is to be noted that not only in the previous Acts, but in the 29th section of the Act of 1896, the provisions as to the Land Commission being satisfied as to the sufficiency of the security are general in their language, and are not limited by or made subject to any qualification whatever—that is to say, they are not limited to any one particular class of sale under the Land Purchase Acts.

I now turn to another section which is prior to the 40th section in the Act of 1896—namely, to the 31st section of that Act. Clause 4 of that section provides in express language that where a holding is sold by the Land Judge to a tenant thereof, and an

advance under the Land Purchase Acts is made for the purpose, the Land Judges shall have the powers of apportionment and redemption conferred on the Land Commission by sections 15 and 16 of the Land Law (Ireland) Act, 1887, and by section 20 of the Purchase of Land (Ireland) Act, 1891, as the same are amended and extended by this Act in like manner as if the Land Judge were the Land Commission. The significance and bearing of this clause is most important. Why? Because it shows that when the Legislature intended to invest the Land Judge with the powers of the Land Commission it did so in express language—nothing could be more express than the language of this clause. I am now approaching the 40th section, and I pause and ask what have we so far? I answer, a plain recognition in the 29th section of the previous law, that it was a necessary condition of getting an advance that the Land Commission should be satisfied of the sufficiency of the security; and secondly, the employment by the Legislature of express language of the most unmistakable character, when it wished to invest the Land Judge with the powers of the Land Commission.

I now approach the third head of my consideration of this case. I come to the 40th section itself. There is not a sentence or a word in that section which purports to give to the Land Judge jurisdiction to ascertain the sufficiency of the security. I take it that the ascertainment of the sufficiency of the security is a function that must be performed by someone. The State is not to lend without reference to the security. This has always hitherto been in elaborate provisions expressly provided. It is a most important matter, and it appears to me most strange that if it was intended to take this power from the Land Commission, and to confer it on the Land Judge, it was not conferred upon him by express language. It is conceded that there is not a word in this section purporting to confer this jurisdiction, and that if it be conferred at all it is conferred by implication. But what renders it still more difficult to believe that it is conferred by implication is the fact that in other matters, where it was deemed necessary to invest the Land Judge with the power of the Land Commissioners, it was done by express language, as I have pointed out by reference to the 31st section of the Act. The nature of the thing itself—that which has been the

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ever paramount consideration with the Treasury, namely, the ascertainment of the sufficiency of the security for the advance of public money—would suggest that language of the clearest and most express character would have been employed if the power to measure the security was intended to be conferred on the Land Judge; and the obligation to use express language was, in my opinion, the more imperative, as the 29th section of the Act, to which I have already referred, apparently proceeded on the assumption that the power to measure the security and ascertain its sufficiency was vested in the Land Commission.

Hitherto my criticism on the 40th section has been of a negative character—that is to say, I have been observing upon what, if the arguments for the appellants were well founded, I would have expected to find, but did not find in that section. I now turn to the language which it uses. It says in clause (*a*): "The Land Commission shall at the request of the Land Judge cause the estate to be inspected, and a report to be made by two Commissioners respecting the estate and the circumstances thereof, and the price at, and the conditions under which, the sale of their holdings to the tenants under the Land Purchase Acts can properly be made." The Attorney-General argued that this report was a final adjudication by the Land Commission as to the amount of the advance. I cannot accept this view; I think it is simply what it purports to be—namely, a report and not a report even by the Land Commission. It is a report of two Commissioners, and not a final adjudication by the Land Commission as to the amount of the advance. It is not an order sanctioning the advance. It is clearly not an order from which there would be an appeal within the meaning of the 41st section of the Act. That section provides that there is to be an appeal by the party aggrieved from an order of a Commissioner sitting alone to the judicial Commissioner, or to the judicial Commissioner and two other Commissioners. And at the stage the report is made there is clearly no party aggrieved; but while I am of opinion that the report is not a final adjudication, is not an order sanctioning an advance, it is, I think, intended to be a guide to the Land Judge as to the basis upon which he may make his offer to the tenants. As it is not a final adjudication the Land Commission may subsequently adjudge that the advance may be

smaller or larger; but I take it that, as a matter of practice, the Land Commission, whilst they might adjudge that the advance might be larger, would not adjudge that it should be smaller than that mentioned in the report. I now come to clause (*b*). This clause has been read so frequently that it is not necessary to read it again. It provides that the Land Judge, after considering the report and all offers that may be made, or any other matter that may be brought before him, and the circumstances of the estate, shall offer to sell to the tenants at such price, and subject to such conditions as to payment of the price in cash, or as to the offer of one tenant being conditional on the acceptance by other tenants of the offer made to them within a limited time, or otherwise, as the Land Judge may consider just, having regard to the interest of all persons interested in the estate. What does all this mean? It means, as the majority of the Court decided in *The Matter of Owen's Estate* (1), that it is obligatory on the Land Judge, after fixing the price, having regard to the matters and considerations referred to in the clause, to offer to sell to the tenants at that price. It is wholly wrong to say that what was aimed at was compulsory purchase. In this I entirely agree with the Attorney-General. No doubt in clause (*d*) a discretionary power was given to the Land Judge if three-fourths in value and number of the tenants on an estate had accepted the offer to declare that the remaining tenants should be deemed to have accepted it; but it was open to the great body of the tenants to accept or not, and there was no power or machinery to compel them to accept. There is power, express power, in clause (*d*), which I have referred to, to compel an unwilling one-fourth to accept. Mr. Justice Ross, referring to this clause, says that the Land Judge can compel the tenants to purchase according to the terms of his offer. This, in my opinion, is not so; he has the power which the clause expressly gives him, and no more. In the language of the clause he may order that the remaining tenants shall be deemed to have accepted the offers made to them. I cannot help thinking that the fallacy which lies at the root of the argument for the appellants is the notion that what the 40th section aimed at was compulsory purchase, and upon this point I am entirely at one with the Attorney-

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General. What was aimed at by the 40th section was not compulsory purchase, but the imposing on the Land Judge of the duty of ascertaining what a just and reasonable price would be, and of making the first offer to sell to the tenants at that price. This was the judgment of the majority of the Court in *The Matter of Owen's Estate* (1). In giving judgment in that case I shortly expressed my own view in these words: "The tenants were to be invited to buy. The initiative . . . rested with the Court. They were, as I have already said, to have, so to speak, the right of the first refusal to buy, and there was to be a correlative obligation on the Land Judge to make to them in the first instance an offer to sell to them the fee-simple of their holdings at a price fixed by him." This is my view as expressed in my judgment in *The Matter of Owen's Estate* (1). The statute made it an imperative obligation on the Land Judge to make an offer which the tenant might accept or refuse, but most undoubtedly did not enact compulsory purchase. What, then, was the true function of clause (*b*)? In my opinion, the making of an offer to sell and not the ascertainment of the sufficiency of the security. There is not, as I said, a single sentence or word conferring this jurisdiction. There is not one word in this clause which purports to require an adjudication on the sufficiency of the security; and it must be remembered that Mr. Justice Ross's judgment does not purport to adjudge that the security is sufficient. The true function, then, of clause (*b*) is to make an offer at a certain price. In my opinion the price is to be fixed in moneys numbered and not in land stock. I grant that an agreement under the Land Purchase Acts presupposes that on its absolute completion the whole or part of the price shall be paid in land stock, but the price to be mentioned in the offer remains as it was under the prior Land Purchase Acts; that is to say, a cash price, which in a later stage of the transaction is to be represented by an equivalent in land stock. I wish to exemplify what I mean. Suppose the report of the Land Commissioners under clause (*a*) states that the price at which the sale can be properly made is £1000, and that an advance may be made of £1000 in land stock, and the Judge thinks that the price ought to be £1200, then, in my opinion, what the Judge should

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do (unless he is prepared to risk the sale falling through by the contingency of the Land Commission refusing to sanction a greater advance than £1000 land stock) is to fix the price at £1200, and add a condition that the tenant should bring into Court a sum of £200, part of the £1200. In that case if the Land Commission thought the security sufficient, they would advance an equivalent to the balance of £1000 in land stock, and then the transaction, on what was tantamount to conveyance, would be complete. £200 cash would be paid into Court, and £1000 land stock advanced. If the Land Commission did not think the security sufficient, the intended sale would fall through, as it did before the Act of 1896, when an advance was refused.

I agree with the argument of the Attorney-General, founded upon the authority which is given to the Judge to attach to the offer a condition as to payment of part of the price in cash. I agree with him in thinking that power to attach this condition was inserted to provide for the contingency of the Land Judge fixing the price at a higher sum than that for which the report of the Commissioners indicated an advance could properly be made, and the very fact of the existence of the power to attach this condition of payment of part of the price in cash shows that the amount for which an advance was to be made was in the exclusive jurisdiction of the Land Commission. The conditions referred to in clause (*b*) are, I am disposed to think, therein exhaustively stated. I do not, however, wish to express a final opinion on this point, as it is not necessary for the purposes of my judgment to do so, but whatever those conditions are, I am of opinion, that the conditions in clause (*b*) and clause (*c*) are intended to be identical, and that on the fulfilment of those conditions the agreement between the Land Judge and the tenant becomes an agreement within the Land Purchase Acts. The words of the clause are—"He shall be deemed to have agreed . . . within the meaning of the Land Purchase Acts," that is to say, an inchoate agreement is entered into, such as existed under the Land Purchase Acts prior to the Act of 1896, an agreement which became absolute on the advance being sanctioned by the Land Commission. Before the Act of 1896, when an agreement was made between the Land Judge and a tenant, it was of an inchoate character, or perhaps I would more correctly

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express the position by saying that until the advance was sanctioned it was subject to be defeated. This is quite plain from the 14th and 22nd sections of the Land Purchase Act of 1887, which expressly draw a distinction between an agreement made by the landlord and tenant for the sale of a holding, and an agreement by the Land Commission to make an advance. This plainly showed that until the Land Commission had agreed to make the advance, the agreement between landlord and tenant, or the Land Judge and tenant, was but a preliminary or inchoate agreement, and that the transaction was not ripe for conveyance, whether by conveyance strictly so-called, or by vesting order, until the advance were sanctioned or made. In my opinion the acceptance by a tenant of the offer of the Land Judge places him, on the fulfilment of the conditions attached to that offer, in precisely the same position as a tenant would have been whose offer had been, before the Act of 1896, accepted by the Land Judge, and the much canvassed words, "and the sale shall be completed accordingly," in my opinion mean nothing more or less than that when the offer has been accepted, and the conditions attached to it fulfilled, the procedure under the Land Purchase Acts shall be applied in reference to the completion of the agreement. That is to say, that the procedure in relation to its completion shall be in accordance with the provisions of the Land Purchase Acts. This view is, in my opinion, entirely borne out by reference to clause (*d*), which declares that when an order is made that an unwilling fourth shall be deemed to have accepted, "the Land Purchase Acts shall apply accordingly." The tenants that have of their own accord accepted the Land Judge's offer, and those that are by the order of the Land Judge to be deemed to have accepted it, are in identically the same position. The sale is not to be carried out under all circumstances, and in any event, but if in the application of the Land Purchase Acts the advance is sanctioned, then the transaction is ripe for final completion under the Acts. If the advance be not made, the refusal to make the advance is made under the provisions of the Land Purchase Acts, and if the advance be sanctioned, the sanction is given under the provisions of the Land Purchase Acts. The procedure must be according to the provisions of the Land Purchase Acts. The words "the Land Purchase Acts shall apply accordingly,"

and their natural and obvious meaning, have been wholly ignored by those who would attach so drastic an effect to the words "and the sale shall be completed accordingly." This view does not, in my opinion, in any way conflict with our decision in *The Matter of Owen's Estate* (1). Having regard to the word "shall" in the earlier part of clause (*b*), we held that an imperative obligation was imposed upon the Judge when he proceeded to a sale of estates within the meaning of the section to make to the tenants an offer to sell to them. That obligation we considered mandatory and imperative. There was a mandate to make the offer, so here there is a mandate to apply the provisions of the Land Purchase Acts.

But the main argument very emphatically put forward on behalf of the appellants was that the 40th section is what was described as a self-contained section as regards all judicial functions. That is to say, in relation to sales under the 40th section, that all judicial as distinguished from ministerial acts were the exclusive province of the Land Judge—that merely a ministerial duty belonged to the Land Commission; but, whilst this proposition is argued it is at the same time admitted that the question of the retention of a guarantee deposit is within the exclusive jurisdiction of the Land Commission. This admission carries with it, in my opinion, the destruction of the argument that all judicial duty centres exclusively in the Land Judge, because the question of the retention or non-retention of the guarantee deposit is eminently a judicial matter, and is, in my opinion, an important one.

It is said that this question of the guarantee deposit is a small matter. I cannot think it a small matter. The amount to be retained will admittedly depend entirely on the view of the Land Commission as to the sufficiency of the security. No doubt the sum retained as guarantee deposit will be invested, and the dividends or interest applicable for the incumbrancers on the estate sold; but there is a great difference between the payment of interest even for a limited time and a right to receive the *corpus* of a fund in cash down. But whether the sum retained as guarantee deposit be small or large in amount, or whether it is retained for a considerable period or a very short period, the determination of the question whether it is to be retained is a judicial act, and as this

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judicial act is admittedly to be performed by the Land Commission, the argument that in relation to all sales under the 40th section judicial functions can be exercised by the Land Judge alone, in my opinion, hopelessly breaks down.

But what remains as to this guarantee deposit? It appears to me to be plain that the question of the retention of a guarantee deposit and the fixing of the amount of the advance are to be done by the same mind at one and the same time. It is a single adjudication. The one tribunal is to say what the security is to be, whether the land and so much of the advance as guarantee deposit, or the land alone. There are not to be two tribunals, one of which may say the entire sum of £1000 is to be advanced; the land is an ample security for the advance of the whole sum: whilst another tribunal may say No—£200 of the £1000 must be retained. If this were so, and it would be admittedly so on the judgment of Mr. Justice Ross, there would be at once an acute conflict of jurisdiction, the very thing which, from the appellants' point of view, is so much to be deprecated.

Before I part with the 40th section I wish to refer to clause (*e*). This clause provides that any person aggrieved by any order of the Land Judge may, with the leave of the Land Judge, or of the Court of Appeal, appeal to the Court of Appeal, whose decision shall be final. Does this in any way involve that there may be an appeal from the Land Judge on the question of the sufficiency of the security? I think not. There is not a word, as I have already said in the 40th section which purports to require an adjudication as to the sufficiency of the security, and Mr. Justice Ross's judgment does not purport to adjudge that the security is sufficient. But what do I find, and I now come to the fourth head of my consideration of the case—namely, the guidance and light to be derived from the sections subsequent to the 40th section—What do I say I find? I find the 41st section coming in immediate sequence to the 40th section, and enacting that any person aggrieved by an order of a Land Commissioner acting alone in carrying the Land Purchase Acts as amended by this Act into effect may appeal to the judicial Commissioner in matters of law, and in all other matters to the judicial Commissioner and two other Commissioners. I wish to direct attention to the words "order of a Land Commissioner acting alone in carrying into effect the

Land Purchase Acts as amended by this Act." How were the Land Purchase Acts amended by this Act? By Part III. of this Act, which includes the 40th section. It would appear to me that that 41st section of the Act of 1896 would include an order of a Land Commissioner made in carrying into effect the offers of the Land Judge under section 40. Before the Act of 1896, by virtue of the provisions of the 29th section of the Act of 1891, an application for an advance had, in the first instance, to be made to one Commissioner sitting alone, and the 41st section would appear to me to embrace the same procedure, and to give a right of appeal. In fact it was the very procedure that was adopted in this case. An application was made in the first instance to Mr. Commissioner Lynch, and on his refusal to advance the land stock, the appeal was made to Mr. Justice Bewley. Can it be supposed for a moment, if such a procedure involving a right of appeal applies, as I think it does, that the single Commissioner in the first instance, and the judicial Commissioner on appeal, will sit without a discretion to make or withhold the advance, and that they are to sit merely to obey the mandate of the Land Judge? This, of course, cannot be so if the section applies, and it appears to me to apply.

I now come to the last section of the Act of 1896—namely, the repealing section. What does it repeal, and what does it leave standing? It repeals, amongst other sections and parts of sections, all of the 24th section of the Act of 1881, but three lines, and what are these three lines? They are these—"*The Land Commission, out of moneys in their hands, may if satisfied with the security, advance sums to tenants for the purpose of enabling them to purchase their holdings.*" These are the three lines which this Act of 1896, which contains, I will not say the now celebrated, I will say the now notorious, 40th section, leaves standing in all their generality. As no exception or qualification is added by the Act of 1896, these unrepealed three lines, which makes the advance dependent on the Land Commission being satisfied with the security, ought to be read as applying to all cases—to the case of every class of purchase by tenants under the Land Purchase Acts.

I have now exhausted everything I had to say, under the four heads of consideration that I proposed to myself, and in my judgment, looking at all the considerations which presented themselves under these four heads the conclusion—I emphasise

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the word conclusion—arrived at by Mr. Justice Bewley should be affirmed, and the appeal dismisssed. It will be perceived that, though I have examined at length the 40th section, I have not confined my consideration of the case to that section alone. Had I done so, I should have, in my opinion, violated the most elementary rule applicable to the construction of statutes.

If Mr. Justice Ross had the jurisdiction which he claims, I am sure that it would be administered with conspicuous ability, with conscientious care, and with a deep sense of the responsibility of his judicial position; but, in my opinion, for the reasons I have assigned, he has not this jurisdiction.

One word more. Mr. Ronan, in his extremely adroit and dexterous reply, applied himself exclusively to the Attorney-General's argument, and importing a term from the Court of Admiralty with which he is familiar as the Queen's Advocate, he said that the Attorney-General "jettisoned" Mr. Justice Bewley. He did, to a certain extent, reject the argument of Mr. Justice Bewley. He adopted his conclusion, but rejected to a certain extent the method by which he arrived at it. It must be remembered, however, that the Attorney-General absolutely jettisoned Mr. Justice Ross's judgment. He rejected both conclusions and reasons. But, whatever may be the Attorney-General's view, I must, on my own responsibility, ascertain for myself what the true construction of the Act is. I have endeavoured to the best of my ability to do so, and I have already expressed the conclusion at which I arrived.

PORTER, M.R.:—

For two reasons it is unnecessary for me to go into the history of the Land Purchase legislation: first, because it has been summarised by the Lord Chancellor and Lord Chief Justice in a way which leaves me nothing to dissent from; and, secondly, because I think this case does not in the main depend upon it.

The special procedure of the 40th sect., and not its procedure only but its substance and enactment, are quite novel. It is a new jurisdiction. In seeing what it means and does there can be no question of taking away, altering, or abridging the jurisdiction of the Land Commission. Whatever jurisdiction the Land Commission had before the Act of 1896, it retains; and the question

before us is simply on whom is the new jurisdiction of this particular clause conferred? I could well understand reasons which might have led the Legislature to confer these new powers upon the Land Commission. It is equally easy to suggest reasons why the Land Judge should have been chosen in preference. We have nothing to do with either. Our duty is merely to ascertain what the enactment, read and construed as it stands, actually does.

I confess myself unable to entertain any doubt upon this question. The section on which many severe strictures have been passed appears to me quite clear, and very well drawn indeed, to indicate its meaning. I am not alluding to the question decided by this Court in *Owen's Estate* (1). That decision, of course, I entirely accept; and, starting from it as a point of departure, we find that in all cases fulfilling the prescribed conditions the 40th section must be applied, and "the following provisions shall have effect." The Land Judge, and not the Land Commission, is to originate the proceeding by a request. On receipt of this request, the Land Commission is to cause the estate to be inspected, and a report to be made by two Commissioners. The construction placed upon these words is that the inspection is to be made not by the two Commissioners themselves (as I at first thought the words implied), but by an inspector nominated by the two Commissioners (Ord. XXXIX., Rule 2, March, 1897), and I do not differ from that view. The inspection is by one person. He is, under the rule, to "report" in a prescribed form; that is, he is to send in the result of his inspection. This, however, is not the "report" mentioned in the section, but only part of the material for it. After the inspection the statutory report is to be made by two Commissioners (under the rules to be selected by rotation). The report is to be one "respecting the estate, and the circumstances thereof, and the price at, and the conditions under which, the sale of the holdings to the tenants under the Land Purchase Acts can properly be made." Now what is to be done with this report? The statute only says that the Land Judge shall consider it—"after . . . considering the report";—but this necessarily involves that it is to be sent to him, and sent as

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a "report" for consideration. The section does not provide for its being brought before the Land Commission at all. It is the report of two Land Commissioners; but a report of two Land Commissioners is not a decision by the Land Commission; and the very word "report" shows that it is not, but is only material for some one else to consider and found a decision upon. This I look upon as being perfectly clear. To sustain the argument of the Attorney-General, who expressly, and in terms, threw overboard the judgment of Mr. Justice Bewley and the ground on which he decided the case, words would be needed which are absent—words, too, which would be inconsistent with the language actually used. Instead of causing the estate to be inspected, and a report of two Commissioners to be made, you would have had the simple statement that the Land Commission shall determine what amount of land stock may in the case of each holding safely and properly be advanced. If it be considered to be a statement of the opinion of the Land Commission (which it certainly is not), it is not an adjudication, order, or decision. It is subject to no appeal. It is not arrived at after a hearing. No party has been heard upon it. No appeal lies from it. It is impossible to hold that it was meant to bind anyone. In short, it is a "report," and nothing else.

What is it a report about? First, it is to be respecting the estate. Not the holding: the estate: and the circumstances thereof. Nothing could be wider. Secondly, it is to be a report respecting the price at, and the conditions under which, the sale of the holding under the Land Purchase Acts can properly be made.

All these things are designed to help the Land Judge to decide the matters which it is his province to determine. The report is to be "respecting" the price, &c. Who is to decide the price? It can admit of no doubt or question that it is the Land Judge; for "the Land Judge . . . shall make an offer to sell . . . at such price . . . as the Land Judge shall consider reasonable and just."

Thus, the report states what, in the opinion of the two Land Commissioners who made it, should be the price. The Land Judge is to consider the report: any offers and other matters

brought before him, and the general circumstances of the estate; and after considering all these things on a hearing in presence of the tenantry and all other parties concerned, he is to offer the holdings to the tenants, not at the price mentioned in the report, but at such price as he may consider reasonable and just, having regard to the interest of all parties interested in the estate.

The price is thus to be fixed by the Land Judge; and his fixing it is a judicial act. The Land Commission does not fix the price; and exercises no judicial function whatever in reference to it, up to this point.

But the Land Judge not only fixes the price but also fixes the amount of it (if any) which is to be paid in cash. If he is to fix the total price, and also the portion of the price to be paid in cash, it is mathematical demonstration that he, thereby, and without more, also fixes, even without naming it, the amount of the price which is to be paid otherwise than in cash, that is, by land stock. For of course there is no question but that the price is to be paid in land stock save so far as part may be required to be raised in money. This is involved in the fact of a sale through the Land Commission; and indeed it is plain from the section that the normal payment is by land stock, except as otherwise directed.

The conditions in sub-sect. (*a*) have in this case been interpreted as including amendments of the rental—by making sub-tenants direct tenants; by requiring cash payments in full by tenants of village plots; by substituting the present for deceased tenants; and by suggesting, in two cases, the retention of guarantee deposits, "having regard to the circumstances" of the tenants. These would appear to me to be all proper matters to be mentioned in the "report," and to be considered by the Land Judge accordingly; and we must presume he did consider them.

In sub-sect. (*b*) the conditions are to be specified in the offer to the tenants, and must, I think, be conditions which the tenant may or may not accept and agree to. But the retention of a guarantee deposit, when once the price is ascertained, concerns not the tenant but the landowner; and without saying that the retention of the guarantee deposit might not be a condition under this clause subject to which the offer was made, I am clearly of opinion that it need not be included in the offer.

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The offer of the Land Judge is to be communicated to the tenant in occupation by the Land Commission; and plainly the Land Commission has no power to modify it, and no power to withhold it. It must go. Whatever else it contains or omits, it must state the price, and the amount of the cash part of the price if any. It is not a mere proposal or suggestion inviting observations. It is a judicial offer which, if accepted, binds all parties; and must be carried out "on fulfilment of the conditions," which must be the conditions contained in the offer, *i.e.* payment of part of the price in cash, and the acceptance of the offer by other tenants or otherwise. I am not concerned to inquire whether or not the report by the two Land Commissioners may or may not be modified by them at any time before the Judge offers the land to the tenant; though I see no difficulty whatever in holding that it may be so modified or added to by a corrective or supplementary report. Once acted on by an offer, however, it is final.

If I am right in this reasoning, it follows that the whole of the argument addressed to us on behalf of the Treasury fails. That argument proceeded on this assumption: that the Land Commission is the tribunal to determine what amount of land stock is to be included as part of the offer to the tenant—in fact, that the report precludes the Judge from doing more than decide the total price, the Land Commission deciding the amount of land stock, and the balance being cash to be named in the offer.

For the reasons I have given, this appears to be contrary to the section; and, as Mr. Ronan argued, it involves a power in the Land Judge to interfere with the security for the advance. Judge Bewley points out in his judgment:—"Having regard to these provisions, as well as to other considerations, it is plain that the circumstances of a tenant seeking an advance to purchase his holding and his solvency must be important elements in estimating the sufficiency of the security for the advance. Hence the inspectors, as they are called, who were employed by the Land Commissioners specially appointed under the Act of 1885 to report on the holdings which were the subject of applications for advances, reported, not only on the value of the lands, but on the farming stock of the tenant, and other matters that might aid the Commissioners in forming an opinion as to whether the instalments of the

purchase annuity would be paid with regularity." The more you exhaust or diminish his stock of ready-money or money's worth by requiring cash payment, the more you reduce the security of the holding. Yet, admittedly, the Land Judge can do this.

There remains, however, the view which the Land Commissioners took of the question, in opposition to that of the Treasury and the Attorney-General. It is contended that, assuming the Land Judge's authority to fix price and cash payment, there is yet an inherent authority in the Land Commission to decline to carry out his arrangements. The offer is to be made at a price, &c., to be settled by him. It is to be communicated to the tenants by the Land Commission. It is accepted by them. There remains behind, however, a right of *veto* in the Land Commission, which will put a stop to the offer and its consequences. In other words, though the tenant "shall be deemed to have agreed to purchase his holding within the meaning of the Land Purchase Acts," the words following, viz., "and the sale shall be completed accordingly," are to be read, "and the sale shall not be completed accordingly, unless the Land Commission shall approve." This is a very strong view of the plasticity of human language.

As I understand, this reserved *veto* is supposed to be implied in the reference to the Land Purchase Acts. No doubt, in the ordinary case of sales to tenants, the Land Commission is by statute master of the situation, with power to withhold or settle the amount of advance by land stock. But sales under section 40 are not such cases. They are regulated by that section alone. And though they are to be carried out by the machinery of the Land Purchase Acts, that only means, as the section says, that they are to be so "completed." In my opinion, the completion is to be taken up at the stage specified in the section—that is, after the Land Judge has judicially determined the price and conditions of the contract, including the amount of Government advance, and after the tenant has been deemed to have agreed to purchase upon those terms.

The Land Commission in the present case transmitted the offer to the tenants. In their view of the law they could not do otherwise, even though they were determined to oppose the completion of the purchase on its terms. Had their view been that of the

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Treasury, they ought to have refused to send it forward at all, treating it as a nullity. It must be sent forward, however; and then, even if accepted by the tenant, must become nugatory, as, in fact, they have held it to be. I do not dwell upon the note appended to the offer by the Land Commission, which was either unauthorised or unnecessary.

Was ever such a result dreamed of in a case of the sort?

The expense of the proceeding, wantonly thrown away, and falling upon the hapless incumbered landowner or his creditors, serious as it is in each case, and enormous as it may be in the aggregate, is the least part of it. I can conceive nothing more calculated to bring the law into disrepute than an enactment like this, if this be its real meaning—providing for reports, evidence, hearings, judicial decisions, carefully prepared conditions; culminating in an offer by a Judge of the Supreme Court to a tenant, accepted by the tenant, directed by the law to be completed accordingly, and all resulting in nothing, as if no offer had been made and none accepted. And this, too, in an enactment which this Court has construed as being in every case mandatory.

The Land Commission has been the body entrusted with the duty of seeing to its sufficiency of advances in the case of voluntary sales. Had the legislature made the Land Commission, and not the Land Judge the tribunal to do so under sect. 40, no one would have wondered or complained. But I cannot see why the Land Judge should not do this just as well; and as I have shown, I think the section says he is to do it. The interests of the public in many cases are placed in different keeping. Many Acts of Parliament sanction payments of public money with consent of the Treasury, or of the Lord Lieutenant in Council, or the like. The Land Commission is not a very old body, entrusted with sacred duties by long standing constitutional usage. It is a very modern body acting under very recent statutes. So is the Land Judge. I can draw no generic distinction between them. The Attorney-General says there are certain esoteric matters connected with the advance of the Government money with which the Land Commission alone is competent to deal; and he specified the county limits as to guarantee, and the difficulty of saying what margin in each case is left for further loans. No doubt the Land

Judge, though for some purpose a member of the Land Commission, has no other official knowledge of these statistics. Neither, I suppose, does the Judicial Commissioner carry them about in his head. They are to be found in the offices of the Land Commission. But surely there is no difficulty, when the money expended in a particular county approaches its margin, in mentioning that circumstance to the Land Judge, either in the report or otherwise; and it would seem to me to be one of the most important "circumstances of the estate," in reference to the question of purchase under the Act, that it is situate in a county in which no further advance, or only a limited advance, can lawfully be made. If so, it is a matter proper to be "reported" to the Land Judge.

I am certain that whoever, whether Land Judge or Judicial Commissioner, has to decide the price to be paid for the holding, and how much in cash and how much in land stock, will, as in the present case, have due regard to the security for the public loan; and that one tribunal is just as fit as the other. It may be edifying to note that in this present case before the Court, almost the only matter to which the inspector drew attention, and which was not already in black and white in the fair rent proceedings and the Landed Estates Court rental, was that important matter, emphasized by Judge Bewley in the passage I have quoted, as to the means of the tenant. He is asked (*b*) :—Does the tenant appear to have sufficient stock and means for working the holding? Answer—"I presume he has!"

But I ought not to refrain from expressing my opinion that while the Land Judge is the authority empowered to fix the price under section 40, and how much is to be land stock, and how much cash, and by his decision to bind the Land Commission and the Treasury alike, there is nothing in the section to deprive the Land Commission by whom the sale is to be completed, of the right which it has, in completing sales by agreement, to require the retention for a limited time of a guarantee deposit. This is the best, and I am convinced, an entirely adequate, security for the public advances, no matter what their amount. The completion of the sale under the Land Purchase Acts involves this, just as much as it involves the power to complete the sale by vesting order or the like. If it is objected that this involves,

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in the case of an encumbered estate, the acceptance, in part of its price, of a deferred payment, I answer that there is no hardship in this, since it will apply only in the case of a tail creditor, who, but for it, cannot otherwise be paid at all; and the interest upon the deposit money will be paid till the principal becomes available.

I am of opinion that the appeal should be allowed.

PALLES, C. B.:—

The question on this appeal is whether the Land Commission are bound to sanction a State advance greater than that for which they are of opinion the lands are sufficient security, if the amount of it has been stated in an order of the Land Judge under section 40 of the Act of 1896, as the portion of the purchase-money of a holding which is to be provided in land stock.

This 40th section, upon which the question depends, is part of, and must be construed with, the code of Land Purchase Acts, as defined by the Act of 1896. Two parts of that code have an especial bearing upon the question: viz.—1, the portions of it which confer and define the jurisdiction, in respect of the advance of State money for the purchase by tenants of their holdings; and 2, those affecting the jurisdiction of the Land Judge as to sales, under that code, to tenants through the medium of his Court.

The material provisions of the first class have been mentioned in detail by the Lord Chancellor, and need not be repeated. It is sufficient to say that the jurisdiction which existed under them in 1896, to make advances of the money of the State for the purchase by tenants of their holdings was vested in the Land Commission, and in it alone; and that every enactment which authorised it to make such an advance was carefully, nay jealously, limited by express and reiterated words, which imposed upon that tribunal, as a condition precedent to the exercise of the jurisdiction, the obligation of being *satisfied with the security*. In the various statutes of the code there is a progressive increase in the proportion of the purchase-money authorised to be advanced. In the Act of 1870, it was limited to two-thirds. By the Act of 1881, 44 & 45 Vict. c. 49, it was increased to three-fourths. By the Act of 1885, 48 & 49 Vict. c. 73, s. 3, an advance of the full amount was authorised, but subject to the obligation of providing

in every case a guarantee deposit of not less than one-fifth; and, lastly, the Act of 1896, by its 29th section, empowered the Land Commission to dispense with any guarantee deposit, "if they," *i.e.* the Land Commission, "think the security for the repayment of the advance is sufficient without it." Further, the same Act of 1896 repeals the limit placed by the Act of 1881 upon the proportion to be advanced; and thus alters the provision as to advances in the latter Act, so that it now reads thus: "The Land Commission, out of moneys in their hands, may, *if satisfied with the security*, advance sums to tenants, for the purpose of enabling them to purchase their holdings."

Thus, whilst each of these Acts is progressively more liberal as to amount, each is equally conservative as to security. Each, in express words, makes the jurisdiction to advance conditional upon *the satisfaction of the Land Commission with the security.* Throughout the code there is no relaxation of the stringency of this condition, which is the basis upon which the entire legislation rests.

The material provisions of the second class, viz., those as to the jurisdiction of the Land Judge, commence with the 45th section of the Act of 1870, which authorised the tenant of a holding on an estate for the sale of which an absolute order had been made, to apply to the Board of Works (now the Land Commission), for an advance, and empowered the Board to "agree" therefor with the tenant; and when he had been declared the purchaser, and had paid at least one-third of the purchase money, to pay the balance of the purchase-money instead of him. This provision was amended by the Act of 1872 (1), the first section of which enabled the application to be made before or after the tenant had agreed to purchase, or had been declared the purchaser, and fixed the limit of the advance at two-thirds of the value of the holding, as assessed by the Board. The 4th section of Lord Ashbourne's Act (2), enacted that where a holding was sold by the Land Judges to the tenant, the sale might, for the purpose of advances, and of guarantee deposits, be deemed to be "a sale by a landlord to a tenant"; and thus all the provisions in that Act, and in the subsequent Land Purchase Acts, in reference

(1) 35 & 36 Vict. c. 32. (2) 48 & 49 Vict. c. 73.

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to sales by landlords to tenants, are made applicable to sales through the medium of the Land Judge's Court.

In result, then, under the procedure as it existed up to the Act of 1896, if the tenant of a holding ordered to be sold in the Land Judge's Court desired to purchase under the Land Purchase Acts, the initiative lay with him, and the tribunal to which he first applied had no knowledge of what would be the probable action of the other. Where the first application was made to the Land Judge, he could not know the amount of the advance which probably would be deemed the *maximum* by the Land Commission. On the other hand, in cases in which the Land Commission were first applied to, it could not know the sum at which the Land Judge would fix the value. Inconvenience and delay may have arisen (whether in fact it did or did not, I do not know) from this duality of tribunals; and it may have so arisen for either, or both, of two reasons:

(*a*) It was possible that there might be a difference of opinion between the two tribunals as to the value of the holding. The Land Judge might estimate that value, and consequently fix the price, at a higher sum than the Land Commission might estimate the value for the purpose of fixing the advance.

(*b*) Inconvenience and delay may also possibly have arisen from the tribunal first applied to not being aware of the view of the other tribunal upon those matters which were within the exclusive jurisdiction of the latter.

One object of the Act of 1896 was to facilitate and expedite the sale of holdings; and for that purpose to provide remedies against certain causes of inconvenience and delay.

If the first inconvenience, *i.e.* that under head (*a*), were one of the mischiefs aimed at, it is plain that the most effective—probably, indeed, the only—remedy, would have been to have centred in one tribunal, in cases within the 40th section, the two jurisdictions which had theretofore existed in two separate tribunals. But if anything is clear upon the Act it is that it did not effect, and did not intend to effect, such a union of jurisdiction. It did intend to confer upon the Land Judge certain specific powers of the Land Commission in relation to holdings sold by him to tenants, such as those referred to in sect. 31, sub-sect. 4, of the Act; but when it

did so it effectuated this intention by clear and express words. It mentioned in the section the specific powers intended to be conferred, the enactment which created them, and then enacted in words that the Land Judge should have those powers, "in like manner *as if the Land Judge were the Land Commission.*"

Further, this appeal (which insists that Mr. Commissioner Lynch was bound to sanction the advance) proceeds upon the basis that the jurisdiction to sanction it continues in the Land Commission, and has not been transferred to the Land Judge. Had the contention been that the statement in the offer of the Land Judge, which defined the portion of the price to be provided in land stock, was a sufficient sanction to entitle the tenant to an advance of that amount, no order of the Land Commission would have been necessary or proper. The proper procedure would have been by *mandamus* to compel the issue of the land stock.

For this reason it appears to me certain that in proceeding to construe this 40th section we must do so upon the assumption that the continued existence of these dual jurisdictions was contemplated by the Legislature, as being the basis of the section, and that whatever additional facilities were intended to be afforded by it were to be worked out by the exercise, by those tribunals, of their respective jurisdictions, save so far as express provision was made to the contrary. It follows that, to support the appellants' contention, we should find some provision, either express or necessarily implied, that in cases within this section the jurisdiction of the Land Commission, which admittedly continues, is extended, so that it is no longer to be restricted to advances for which it is satisfied that there is sufficient security; but that, with this extended jurisdiction, they are deprived of all power of its *judicial* exercise, and that their functions are reduced to the ministerial duty of registering the decision of another Court—a strange position to which to find such a tribunal reduced.

I proceed to ascertain whether the section contains any such provision. In considering the section, I first ascertain from the Land Purchase Acts the meaning of the expression in clause (*a*), "the conditions under which the sale of the holdings to the tenants under the Land Purchase Acts can properly be made"; and I find that

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those conditions are at least two :—(1), That the advance must be limited to the amount for which the Land Commission are satisfied that the security is sufficient; and (2), that there must be a guarantee deposit of at least 20 per cent., unless the Land Commission are satisfied that the security for the advance is sufficient without it. I then read in these conditions, instead of their equivalent in clause (*a*), which will then read thus :—"The Land Commission shall, at the request of the Land Judge, cause the estate to be inspected, and a report to be made by two Commissioners respecting the estate, and the circumstances thereof, the price at which the sale of the holdings to the tenants under the Land Purchase Acts can properly be made, and also as to the amount of the advance for which, in the case of each holding, the *Land Commission* are satisfied that the security is sufficient, and the opinion of the *Land Commission* as to the security for the repayment of each of the advances being or not being sufficient without the guarantee deposit."

The matters of the first class, as to which the Land Commission is to report, viz. the circumstances of the estate, and the price at which the holdings can properly be sold under the Acts, are matters which are material to the exercise by the Land Judge of a jurisdiction vested in him, and in him alone—viz., the jurisdiction to fix the price; and therefore the object of the Legislature, in directing the report as to those matters, must have been to put at the disposal of the Land Judge, for his information, matters within the knowledge of the officers of the Land Commission which might be material to him in exercising his jurisdiction. But the matters of the second class—the amount of the advances, and the sufficiency of the security without the guarantee deposit are of a wholly different character. As to these the material consideration is, not the advance for which the security is in fact sufficient, but that for which the *Land Commission is satisfied* that it is so; not whether that security is sufficient without a guarantee deposit, but whether the *Land Commission is of opinion* that it is so.

So far it is impossible to contend that any tribunal, other than the Land Commission, has the jurisdiction to determine either the amount of the advance, the necessity for a guarantee deposit, or the amount of such deposit.

There has, however, been much controversy as to the effect of the report. It has been asked, is it or is it not a final adjudication by the Land Commission upon the matters to which it refers? I am unable to agree in the contention of the Attorney-General that it is. I conceive that the final adjudication must be by an "order," within sect. 29, sub-sect. 1, of the Act of 1891, and sect. 41 of that of 1896—an "order" which is liable to be reversed upon a rehearing, if demanded by the Lord Lieutenant; an "order" to which a specific effect is given by sect. 35 of the Act of 1896, and which under sect. 41 of that Act is subject to appeal. Such an "order" must be made upon the application of some person capable of being an appellant, and no such person can be in existence at the time when the report is made. The Legislature, however, appear to have regarded the report as valuable, as being a statement of persons supposed to have special knowledge, made under a due sense of responsibility, upon considered grounds, with the view of its being acted upon by another tribunal as the basis of its judicial action. To this extent the Legislature has provided a remedy against the second inconvenience, to which I have previously adverted.

So much for clause (*a*). I now come to clause (*b*), the clause under which Mr. Justice Ross has held that he has acquired power to determine the amount of the advance. The Land Judge, after hearing all parties, and considering the report, any offers that may be made for the purchase of the estate, any other matters that may be brought before him, and the general circumstances of the estate, is to make to the tenant an offer which is described in the following words:—"An offer to sell to him the fee-simple of the holding . . . at such price, and subject to such conditions, whether as to the payment of part of the price in cash, or as to the offer to one tenant being conditional on the acceptance by other tenants of the offers made to them within a limited time, *or otherwise*, as the Land Judge may consider reasonable and just, having regard to the interest of all persons interested in the estate."

Before determining the effect of these words, we must first see what are *the conditions* subject to which the offer is to be made. The words describing these conditions are capable of either of two constructions—viz. (1). That the words prior to "*or otherwise*" exhaustively define the subject-matter of the conditions, so that

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these words "*or otherwise*" mean that which would be more grammatically expressed by "*or not*" following each limb of the previous clause, which on that construction would read thus: "And subject to such conditions, whether as to the payment of part of the price in cash *or not*, or as to the offer to one tenant being conditional *or not* on the acceptance by other tenants of the offers made to them." (2). The second possible construction is that the words "or otherwise" mean any conditions other than those expressly described. As clause (*c*) does not confer on the tenant the status of "having agreed to purchase" until fulfilment of the conditions, it is manifest that the first suggested construction, by reason of its being the most limited one, is the construction which is most in favour of the appellants' contention; and in my opinion that limited construction is the true one.

On this construction, the jurisdiction of the Land Judge is expressly limited to determining (1), the price; (2), whether any, and if so, what part of the price is to be paid in cash; and (3), as to the offer to one tenant being conditional on the acceptance of the offers made to the others. Eliminating the third of these conditions, which cannot help the argument either way, the jurisdiction of the Land Judge is limited to two matters. His jurisdiction in reference to the first, the price, is no more than the jurisdiction which he had before the Act. Thus the only new jurisdiction conferred on him is as to the second, to determine what part of the price is to be paid in cash. But as the offer of the Land Judge is one which is to be carried out under the Land Purchase Acts, it is essential that part of that price shall be paid by guaranteed land stock, in which alone State advances for this purpose can be made; and if the amount of that advance required the sanction of another tribunal, it would have been impossible that the Land Judge could have retained his unfettered jurisdiction to fix the price, unless he had also power to determine that a specific part of that price to be fixed by himself should be paid in cash. No sale can be carried out under the Land Purchase Acts in which the difference between the price fixed by the Land Judge and the amount of the State advance shall not be paid in cash. This consideration shows that it was necessary that this jurisdiction, to

determine the portion of the price to be paid in cash, should be conferred on the Land Judge, to enable him, under the new state of facts contemplated by the section, to effectually exercise his previously existing jurisdiction to fix the price.

It is argued that as the Land Judge has express power to fix the price, and also the cash portion of it, he has implied power to fix the stock portion of it, which must be the difference between the other two sums; and that as a tenant who accepts must be deemed to have agreed to purchase at the sum so fixed in cash and stock, and as that sale is to be completed under the Land Purchase Acts, the Land Commission are bound to do that without which the sale cannot be so completed, viz. sanction the advance of the portion of the price fixed by the Land Judge in land stock.

This argument fails, in my opinion, for two reasons. First, it is impossible to contend that if power to fix the amount of the State advance has been conferred upon the Land Judge, his jurisdiction as to it is more extensive than that of the Land Commission, or that he would have power to sanction an advance of any greater amount than he was satisfied there was sufficient security for, either with or without a guarantee deposit. But as he does not obtain the jurisdiction by way of transfer, a mode which would limit his jurisdiction to, and measure it by, that of the tribunal from which it was transferred, one would have thought that the Legislature, in conferring the jurisdiction, would have in clear words defined its limits, as, for instance, by expressly imposing upon him the obligation of satisfying himself as to the sufficiency of the security; yet not only is there a total omission of any words to that effect, but the concluding words of the clause, "having regard to the interest of all persons interested in the estate," seem to exclude this consideration.

Further, as I understand Mr. Justice Ross, his opinion (an opinion in which I believe each member of this Court agrees) is that the Land Judge has not jurisdiction to consider the question of guarantee deposit. If this be so, the power or jurisdiction which it is alleged has become vested in him is part only of a jurisdiction which is a single and indivisible one. The Land Commission had not, in respect of this matter, two separate jurisdictions: first, to determine the amount of the advance, irrespective of the guarantee deposit; secondly, to determine whether there should be a

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guarantee deposit. The necessity for a guarantee deposit was a limit placed by the Act of 1885 upon the jurisdiction as to the *amount* of the advance; and the jurisdiction in respect of the guarantee deposit given by the Act of 1896 is no more than a removal, under certain circumstances, of that limit. The *maximum* advance capable of being satisfactorily secured cannot be fixed, unless it is at the same time determined whether there is or is not to be a guarantee deposit; and if there is to be one unless its amount is fixed. Under sect. 29, sub-sect. 1, of the Act of 1896, these two matters are determined at the *same time*, and by the *same tribunal.* Were it otherwise, part of the subject-matter of the security would be left in doubt; for such a deposit, when required, is part of that security. This admitted absence of jurisdiction to determine the amount of the deposit renders it impossible for the Land Judge, if he has the power to increase, and does increase, the amount of land stock stated in the report, to determine effectively in the interests of the estate, that which he is expressly told to determine, viz. whether a particular offer of a tenant or of a stranger shall be accepted. I say this because if the Land Judge has power to increase the amount of the advance, so must the Land Commission have power to increase the security for it. This it can do only by increasing the amount of the deposit; and until the amount of the deposit is ascertained, the Land Judge cannot know the full pecuniary value of the offer, in such a way as to be able to compare it with a present payment by a stranger, which must be entirely in cash.

This brings me to the second reason for which, in my opinion, the appellant's argument fails. It rests upon a misinterpretation of the words "shall be deemed to have agreed to purchase the holding." It will be found that throughout the code this status is often, if not invariably, applied to a tenant after he has made an agreement for purchase with his landlord, or with the Land Court, but *before the advance is sanctioned* by the Land Commission. And if that is so, of course the position he would have attained under the section by his acceptance of the Land Judge's offer would be that of a tenant preliminary to the advance having been sanctioned. Of the many instances which could be given of this in the Acts prior to 1896, I shall content myself by referring to three only.

The 14th section of the Act of 1887 (50 & 51 Vict. c. 33) enacts that "When an agreement has been made between a landlord and a tenant for the sale of a holding, and the Land Commission are satisfied that the landlord and the tenant are *prima facie* entitled to carry such agreement into effect, *and the Land Commission have agreed to make an advance* under the Land Law (Ireland) Acts," certain enactments shall apply. This section treats the agreement as having been made before the advance has been sanctioned.

Again, sect. 22 of the same Act enacts: "When, either before or after the passing of this Act, a sale of a holding has been agreed to be made by a landlord to a tenant, *and an application for an advance to enable the tenant to buy the holding has been sanctioned by the Land Commission*, either party to the agreement for sale may apply in a summary manner to the Land Commission to decree the specific performance of the agreement." The same observation applies to this section.

Further, sect. 35 of the Act of 1896 enacts that "Where an agreement for the purchase of a holding is made after the commencement of this Act and is lodged with the Land Commission, the purchaser shall, in the event of the sale being carried out, be discharged from all liability" . . . "*but if the advance is refused the agreement shall be void.*" Thus the agreement is treated as an existing one, although capable of being voided by a subsequent refusal of the advance.

This argument is confirmed by sub-sect. 4 of sect. 31 of the Act of 1891, which authorizes the Lord Lieutenant, if it appears to him that the security for an advance sanctioned by the decision of a single Commissioner is insufficient, to require the case to be reheard by three Commissioners; and also, by sect. 41 of the Act of 1896, which entitles persons aggrieved by the order of a Land Commissioner acting alone to have it reheard or reconsidered, as, if the contention of the appellants is tenable, there could not, in a case within the 40th section, be any such rehearing or reconsideration; and I am unable to find anything in the Act which justifies me in holding that the above sections are inapplicable to such a case.

Upon the whole, I am of opinion that when the tenant is,

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under clause (*c*), to be "deemed to have agreed to purchase the holding within the meaning of the Land Purchase Acts," he is in the same position as if, before the Act, he had agreed with the landlord to do so, with this one additional advantage, that he is aware that the Land Commission have, by their report, indicated their intention to provide a certain amount of stock towards completing the purchase.

The words "and the sale shall be completed accordingly" have the same significance as have the corresponding words in the subsequent clause (*d*), "and the Land Purchase Acts shall apply accordingly." They mean that the provisions of the Land Purchase Acts in relation to the procedure subsequent to the agreement between the landlord and the tenant, are to apply, and some of those very provisions are that an application for the advance shall be made to the Land Commission, and that the jurisdiction to determine the amount of it shall be in them. In other words, that the procedure which has been uniformly adopted since the Act of 1896, which has been adopted in this very case, and which the appellants, by this appeal, insist is the proper procedure, *i.e.* an application to the Land Commission to sanction the advance, is the course indicated by these words.

No assistance, in my opinion, is to be obtained from a consideration of clause (*d*), which authorizes the Land Judge, if it appears to him that a certain proportion of the tenants have accepted the offers under this section, and if, "having regard to the circumstances of the case, he thinks it expedient," to order that the remaining tenants, or any of them, shall be deemed to have accepted the offers made to them. In this event "the section and the Land Purchase Acts are to apply accordingly," subject to a proviso that the order shall not apply to any tenant if the purchase-money of his holding would exceed the limitation of the amount of the advance imposed by section 2 of the Act of 1888. It was argued that this proviso negatived any jurisdiction in the Land Judge to order a tenant who had not accepted the offer to provide any portion of the purchase-money himself; that therefore the entire purchase-money of the holding of such a tenant should be in land stock; and that therefore the jurisdiction of the Land Judge to fix the price of such a hold-

ing involved a jurisdiction to fix the amount of the land stock to be advanced for his purchase; and it was further argued that, if this were so as to a tenant who had not accepted the offer, so also should it be as to one who had accepted it. But if the Land Judge made an order within this section, and if the offer referred to in that order contained a condition that part of the price should be paid in cash, then the tenant should be deemed to have agreed to purchase, only upon the payment of the cash portion; and if he made default in so doing, then he would not be at all brought within the concluding part of the section. It may be that, for this reason, a tenant cannot be compulsorily forced to purchase in any case in which the offer requires payment of part of the price in cash—a result, in my opinion, in the highest degree reasonable. But it has been argued that this result cannot be deemed to have been in the contemplation of the Legislature. To this I answer that it is one which must ensue in every case in which the Land Judge requires part payment in cash, and this whether the Land Judge has or has not power to fix the amount of the advance of land stock. For the purpose, therefore, of the present appeal, the discussion on this point is an academical one. It may affect our opinion as to the skill of the draughtsman; it cannot affect the result of this appeal.

Thus all the words used in the statute are at least as consistent with the absence of, as with the existence of, an intention to vest in the Land Judge jurisdiction as to the amount of the advance; and in my opinion an intention to do so, in a statute such as the present—being, as it is, part of a code throughout the entire of which that jurisdiction is invariably conferred upon another tribunal—ought to be evidenced by express and clear words, or at least by implication of the highest necessity. I am unable to find any such clear or express words, or indeed any words whatsoever, which can have this effect, and I hold that the implication relied upon is not a necessary one. For these reasons, which are those expressed in other words by Mr. Justice Bewley, I am of opinion—and, I must say, without any greater doubt than that necessarily caused by differing from many of my colleagues—that the Land Judge has not jurisdiction to determine the amount of land stock which ought to be advanced, by way of State aid, for the purchase of a

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holding within the 40th section; and that the Land Commission are not under an obligation, nor have they power, to sanction an advance to that amount in a case such as the present, in which they are of opinion that the security for that advance is insufficient.

I am of opinion that this appeal should be dismissed.

FITZ GIBBON, L.J.:—

I concur with the Master of the Rolls. Holmes, L.J., has permitted me to read his judgment. I shall endeavour to avoid repetition or anticipation, and to limit my contribution to the voluminous pronouncements of this full Court, so far as is consistent with that independent statement of my opinion which it is my duty to give. The controversy between the Land Judge and the Land Commission, which threatens to wreck the working of the Land Purchase Acts in an important branch of their administration, is not so much a conflict of jurisdiction as a competition for the jurisdiction, and the consequent duty, of measuring the amount of the aid to be advanced out of public funds for the purchase of holdings which fall within the Act of 1896, sect. 40 (1). Before entering the maze of difficulties presented by that section, I wish to recall attention to the facts of the case before us, and to the real subject-matter in dispute, so far as the *Harkness Estate* is concerned. The portentous consequences with which we are threatened from a decision in favour of this appeal are not indicated by the circumstances of the particular case from which the discussion has been developed. The appeal is brought from an order of Bewley, J., dated January 4th, 1898, confirming on appeal a note or memorandum of Mr. Commissioner Lynch dated November 8, 1897, which is endorsed upon an offer made by the Land Judge to sell their holdings, at certain prices payable in land stock, to five tenants, which offer the tenants had accepted. Attached to the offer was an application for an advance of the necessary land stock; and Mr. Commissioner Lynch endorsed this application with these words:—

"The Land Commission, not being satisfied as to the sufficiency of the security, doth refuse the within application." The

tenants appealed against this refusal, and treating the question as one of law, the Judicial Commissioner alone heard the appeal, and made an order thereon in these words :—

"The Court doth declare that the said Commissioner, *i.e.* Mr. Commissioner Lynch, was not under a statutory obligation under the provisions of the Act to sanction advances of the said sums of Guaranteed Land Stock which (*sic*) the said Land Judge directed their respective holdings should be offered to the said tenants as mentioned in the schedule hereto, and that the discretion of the Land Commission in making advances to purchasing tenants had not been taken away by the 40th section of the Act of 1896, in respect of purchases under that section; and doth dismiss the appeal accordingly."

Throughout his lengthened judgment, Bewley, J., makes no reference to the question of the sufficiency of the security in the case before him, and it is not stated that Mr. Commissioner Lynch considered that question at all after the accepted offer was lodged with the Land Commission. He certainly did not call for, obtain, or consider, any of the materials upon which the Land Judge had fixed the prices of the holdings. At a prior stage, on February 20, 1897, two Land Commissioners, of whom Mr. Commissioner Lynch himself was one, reported to the Land Judge their opinion that the sales could properly be made under the Land Purchase Acts; and they stated the advances which they then considered would be adequately secured in the event of the sales being carried out. All this difficulty has been raised upon the question to which of the two tribunals the Legislature has entrusted the jurisdiction to fix the amount of the advances. Bewley, J., contends that the highest public interests are involved in reserving this jurisdiction to the Land Commission, and asserts that, on the question of price, the Land Commission are "perfectly impartial," while the object of the Land Judge would be to get as large a price as he could for the estate, but that whether an advance would be adequately secured or not is a matter with which that Judge has no concern. In this Court arguments have been urged which rest upon the supposed inability of the Land Judge to discharge the duty; and the interpretation of the Acts has been discussed with reference to supposed practical difficulties in carrying out

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its provisions through the machinery at the Land Judge's disposal. It is therefore not immaterial to vindicate the possibility of working section 40 through the Land Judge by referring to what has been done in the present case. The advances mentioned in the Commissioners' report of February, 1897, amounted to £2365. The amount at which Ross, J., offered to sell, and the tenants agreed to buy—after all parties including the tenants had been heard, and after the report, with all the other matters and circumstances concerning the estate, had been considered as the Act directs—was £2589. The difference, therefore, which was the sole ground for the indiscriminate and peremptory refusal of each and every one of the five advances sought was £224. In three of the cases it amounted to £27 out of £577, about 5 per cent. In one case it was less than half a-year's rent. Great issues may be at stake, and the legal questions must be decided, but the facts prove that, in this particular case, there was no difficulty which might not have been easily surmounted, and no reason to say that the Land Judge could not, or did not, safeguard the interests of the State at least as effectively as the Land Commission could have done. His offer was made after he had acquired more satisfactory materials for a just estimate of the fair price and value of the holdings than the Land Commission ever had, or could have had, and that offer, though accepted by the tenants, was arbitrarily nullified, without any consideration, upon the previous and *ex parte* estimate of the sufficiency of the security which was contained in the report of Commissioners Lynch and Wrench, made when they apparently had no means of fixing the proper price of the holdings except a defective report of an inspector who took no evidence, who does not appear to have had any previous knowledge of the property, and whose report was not communicated to the Land Judge, and was only produced to this Court under compulsion, after the solicitor of the Land Commission had stated that he was directed not to produce it unless the Court ordered him so to do.

So far as we have been asked to decide the question of jurisdiction between the two tribunals upon a comparison of the relative applicability of their procedure to the subject, it is legitimate to refer to the case before us as an object-lesson.

No practical advantage, no additional safeguard, no substantial amount of money, has been shown to be involved in the dispute, and we cannot interpret the Act in favour of the Land Commission, as against the Land Judge, upon any of the grounds of expediency, and of relative superiority, which are put forward most prominently in the judgment of Bewley, J., which is the subject of this appeal.

But we must not decide the construction of the Act upon such grounds. The analysis of its language will be developed in detail by Holmes, L.J., and I confine myself chiefly to more general observations. The question upon section 40 (1) ultimately comes to this—What effect is to be given to the words in sub-section (*c*), "The sale shall be completed"? What stage has the transaction reached when an offer made by the Land Judge, and communicated by the Land Commission to the tenant, has been accepted by him? Three answers have been given; one of which has been presented in such doubtful shape that it possibly ought to be counted for two. First, that when the Land Judge makes his offer, and the Land Commission communicates it, it is treated as the offer of a capable vendor, and, the Land Judge and Land Commission being bound by the offer, acceptance by the tenant makes the mutual obligation to complete the sale conclusive, and nothing remains but the administrative, ministerial, and consequential business of completion. This is the contention of the Land Judge, it is the opinion of the Master of the Rolls, and it is mine.

Secondly, in this Court, in the most distinct and positive language, the Attorney-General, being counsel for the Treasury, and representing the State, disclaimed any construction which would deprive the offer of the Land Judge, when communicated, of binding force as a definite offer which the tenant could safely and finally accept, without risk of subsequent disappointment as to the completion of the sale through any difficulty on the part of the public authorities concerned. The jurisdiction which the Attorney-General claimed for the Land Commission was a jurisdiction to consider and sanction the advance *before, but not after*, the Land Judge made the offer to the tenants. His objection to carrying out the offer in the present case was that the Land Judge made it without having obtained

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the sanction of the Land Commission. This second alternative has been presented in two forms, sometimes combined, sometimes separately, leaving it doubtful whether it is really one, or ought to be treated as two. I shall therefore describe it, in the style of the Act, as 2 *a* and 2 *b*. 2 *a*. The jurisdiction of the Land Commission in sanctioning the advance is to be exercised in preparing the report under sub-section *a*; their determination is to be conveyed to the Land Judge in and by that report, and he may base his offer upon it, and may bind the Land Commission to make any advance mentioned in the report. 2 *b*. The jurisdiction of the Land Commission to sanction the advance is to be exercised in some undefined way, and at some unfixed time or times, within the period up to, but not after, the making of his offer by the Land Judge. When or how the Land Judge is to submit his intended offer to the Land Commission—what right or jurisdiction the Land Commission has to control the terms of that offer—how such a control could be exercised consistently with the unquestioned powers of the Land Judge—how the procedure prescribed by the Land Purchase Acts in every case in which the Land Commission sanctions an advance can be applied to such a jurisdiction—whether or how, up to the last moment, the offer is to be modified to suit the estimate of the Land Commission—and how their final determination is to be judicially reached, finally expressed, or formally attested as a judicial act—the answers to these questions, one and all, have been left in total darkness by the Attorney-General, and, being unable to answer any one of them, I reject his interpretation of the section, unless the report can be relied on as the exercise of the prescribed jurisdiction, a matter which I propose to discuss separately.

The third interpretation is that of Bewley, J. It is intelligible. It reserves the full jurisdiction to the Land Commission, and recognises the duty of exercising it in the full statutory form. It is capable of being worked out consistently with the language of all the Land Purchase Acts, *with the important exception of section* 40. But it reduces that section to an abortion, and it reduces the offering Land Judge, and the accepting tenant, from the position of a judicial vendor, and a capable purchaser to that of the drawer and acceptor of a bill of exchange upon which the manager of the bank at which it is presented for discount

is at liberty to write the commercially contemptuous endorsement—"*No account: refer to drawer.*" The opinion of Bewley, J., is that all the proceedings which culminate in the acceptance by a tenant of the offer judicially framed and made as "reasonable and just" by the Land Judge—as to whom Bewley, J., says—"That the Land Judge has the absolute right to fix the amount of the price cannot be, and never was questioned"—communicated to the tenant by the Land Commission without any jurisdiction to alter it in one jot or tittle—and accepted by the tenants on the faith of a Judge who had heard all parties, including themselves, before fixing its terms—only advances the sale to the same stage as if the Land Judge and the tenant were two private individuals—a landlord and a tenant—who had agreed between themselves for the sale and purchase of a holding, who must still submit their proposal to the Land Commission, and must apply for an advance which they cannot get unless and until they can satisfy one Purchase Commissioner, with an appeal to the Judicial Commissioner and two Purchase Commissioners, that the advance is secure. "This enactment," says Bewley, J., "merely puts the purchasing tenant in the same position as if he had agreed to purchase the holding within the meaning of the Land Purchase Acts." His contention, therefore, is that when section 40 says "the sale shall be completed," it means no more than that the accepted judicial offer shall be treated as a personal contract, entirely dependent, and absolutely conditional, upon the sanction of the Land Commission, and that it must go through all the same steps, and be submitted to all the same criticisms, and obtain the same sanction, as if no report had been made, no impartial Judge had considered it, no duty had existed, and no precaution had been taken, to see that it was reasonably just—in short, it was no better than the estimate of an interested owner and tenant of the amount of the public money which they would like to get out of the public purse towards completing their private bargain.

This Court, in *Owen's Estate* (1), has declared it mandatory upon the Land Judge to go through the procedure prescribed under section 40, in the case of every estate to which that section applies.

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The employment is thus thrust upon him, and he must go through the business as gravely as he can, at an incalculable cost of time and money, disastrous to the parties interested. All this must be done by a judicial Sisyphus who knows that when, with infinite difficulty, he has rolled his burden to the summit of the eminence occupied by the Land Commission, he is powerless to keep it there for a moment, if it fails to receive the autocratic sanction of a Purchase Commissioner. I hold that we ought to find clearer words than I can discover in section 40, to force us to the conclusion that the function which our own Court has pronounced to be mandatory upon the Land Judge—subject, too, at every step, as it is, to an appeal to this Court, whose decision, under sub-section (*e*) is declared to be final—results only in advancing a sale to the initial stage at which the real business is only to commence.

That no better security to the State is secured by the opposite conclusion, in the way of careful judicial investigation upon adequate materials, is shown by contrasting the elaborate and costly procedure by which the terms of the offer are fixed by the Land Judge in the first instance, with the summary control claimed for a single Judicial Commissioner, subject, as in this case, to the reconsideration of the Judicial Commissioner alone, or at best to that of the Judicial Commissioner and two other Commissioners, one or both of whom may have framed the original report for the consideration of the Land Judge, and who may be so convinced of the infallibility of their preliminary estimate that an advance will be peremptorily refused altogether, without any reconsideration, as it was in this very case, rather than raise the price from £390 to £400, upon a single holding.

I return to the examination of the words of the statute. I regard the word "conditions," occurring in sub-sections (*a*), (*b*), and (*c*), as the most important key to the construction of the whole section. In a right understanding of the use of that word I find what I cannot regard as less than an affirmative enactment that the jurisdiction to fix the advance shall be exercised by the Land Judge and not by the Land Commission. In (*c*), "on fulfilment of the conditions, the tenant shall be deemed to have agreed to purchase the holding within the meaning of the Land Purchase Acts." According to their apparent sense—*i.e.* to any one who reads them as meaning anything practical—these words import

that "the conditions," whatever they are, when fulfilled, will satisfy all the requirements of the Act. The one universal and essential condition of every purchase within those Acts is that it is aided by a State advance. Every condition, therefore, essential to obtaining such an advance must precede the completion of the sale, and must therefore be included in "the conditions" to be fulfilled under sub-section (*c*). But to demonstrate that the term is used in this, its natural extension, in sub-sect. (*c*), I go back to sub-sect. (*a*), and there I find, specifically directed to be included in the Report of the two Commissioners to the Land Judge, "*the conditions under which the sale under the Land Purchase Acts can properly be made.*" There is here no ambiguity whatever—no room for the suggestion that the conditions to be dealt with in the report are to omit anything essential to a proper sale under the Acts. The Commissioners are not to report upon the fluctuating terms of a conditional or inchoate agreement; but upon "the conditions under which the sale under the Acts can properly be *made*;" and the word "*made*" in sub-sect. (*a*) must cover the same ground as the word "*completed*" in sub-sect. (*c*). From that position there is no escape.

I now follow the word "conditions" into sub-sect. (*b*), which affirmatively defines the duty of the Land Judge, and confers jurisdiction upon him to discharge it. He is to hear all parties; he is to consider the report, other offers, and other matters, and the general circumstances of the estate. How can he consider the report for any judicial purpose, if he is not to consider "the conditions" which it is directed to state? How can he be authorized to consider these conditions judicially for any purpose, if he has not jurisdiction to give effect to the conclusion to which his consideration leads him? As a subject of consideration, and consequently as a subject of jurisdiction, the report is expressly put on the same level with "other offers," *i.e.* with estimates of the value of the holdings made by outside bidders. Even if there were nothing else in sub-sect. (*b*), the very use which the Land Judge is directed to make of the report, and consequently of "the conditions" mentioned therein, would satisfy me that jurisdiction is conferred upon him to modify those conditions. The price, the reasonableness of which is to be adjudged by the Land Judge, is

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to be ascertained by comparing the price estimated in the report with the price offered by an outside bidder. Bewley, J., and everyone else, admits the *exclusive* jurisdiction of the Land Judge, subject to appeal to this Court, to fix the price in every case under sect. 40. If that price be fixed by the Land Commission, either in the report or subsequently, in that undefined and irregular way which was suggested by the Attorney-General, it cannot be fixed by the Land Judge at all; but if he can modify the estimate of the Land Commission, however formulated, he can, and in most cases he must, also have power to alter the most essential condition mentioned in the report, namely, the amount of the advance which is reported as one which can properly be made under the Acts. But sub-sect. (*b*) does not stop here; it also uses the word "condition," and it expressly employs that word, so as to show that "the conditions" are within the affirmative jurisdiction of the Land Judge. He is to make the offer "subject to *such conditions*, whether as to the payment of part of the price in cash . . . or otherwise, as he may consider reasonable and just." I shall refer again to these words from the point of view of Bewley, J.; what I have now to point out is that the express jurisdiction to impose a "condition requiring payment of part of the price in cash," implies a jurisdiction as to the mode of payment of the balance. That balance can only be paid in land stock, if the sale is at all within the Purchase Acts. With this demonstrative proof of the meaning of the section, as to the very point at issue, I will not linger over smaller points, such as the words "or otherwise," which seem to have been added to prevent the possibility of doubt that the whole jurisdiction to fix "the conditions" of the purchase, including the mode of payment, and therefore including the advance of land stock, is conferred without reservation upon the Land Judge, subject to appeal.

Tracing "the conditions," thus, from (*c*) to (*a*), and from (*a*) to (*b*), to use an arithmetical metaphor, I prove my answer by bringing them back from (*b*) to (*c*), where the tenant is deemed to have agreed, and the sale is to be completed, "on fulfilment of *the conditions*." The conditions mentioned in the report under (*a*) are subjected to the judicial consideration, and the exclusive jurisdiction, of the Land Judge under (*b*), and, on their fulfilment under (*c*),

the sale "shall be completed." Therefore, when the offer has been accepted, nothing remains but the ministerial duty of advancing the money, and carrying out the transaction. *Q. E. D.*

As if to doubly demonstrate that ministerial completion is to be distinguished from judicial sanction, the Act of 1885, sect. 9 (4), contrasts the two things, where both are within the jurisdiction of the Land Commission, by enacting in the case of encumbered lands that the Land Commission, before *sanctioning or completing* a sale, shall give certain notices.

The opinion which I have formed will be fortified by detailed reasoning, and by further references to other parts of the code, by Holmes, L.J. I omit many points, but I direct particular attention to the contrast between sub-sect. 1, clause (*c*), and sub-sect. 2 of sect. 40 itself, to prove that an accepted offer under (*c*) is not treated as having only reached the stage of an agreement made between an individual landlord and an individual tenant, which has still impending over it the full jurisdiction of the Land Commission, and is still conditional upon obtaining their sanction, and satisfying them that the security is sufficient. For, in sales under sub-sect. 2, the occupier and the Land Judge are empowered to agree to a sale and purchase, and thereupon the occupier "shall be deemed a tenant, *and the Land Judge a landlord.*"

Exactly the same phrase is used in another section in this code, which, under the Act of 1896, section 50 (4), is to be construed as one. As I read it, the Ashbourne Act, section 4, not only furnishes another contrast of the position of the Land Judge, when "deemed to be a landlord," with his position as a judicial vendor under section 40; it also turns an argument upon which the Attorney-General laid great weight into an almost conclusive argument against him. I allude to the argument about the guarantee deposit. He asked whether the Land Judge had jurisdiction over the guarantee deposit, and appeared to think that, if he had not, he could not measure the advance. In my opinion, the Land Judge has no jurisdiction over the guarantee deposit. But why? Because the last clause of the Ashbourne Act, section 4, contains a definite enactment to that effect, in these words: "Where a holding is sold by the Land Judge to the tenant of that holding, the sale may, *for the purpose* of advances under this Act,

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and *of guarantee deposits* under this Act, *be deemed to be a sale by a landlord to a tenant.*" If, under these express words, the Land Judge is deemed a landlord for the purpose of guarantee deposits, why is he to be deemed no more than a landlord, when it is enacted that when his judicial offer has been accepted, "the sale shall be completed." I do not admit that the guarantee deposit concerns the purchaser or affects the price as against him. He is to get the holding for a reasonable price. He is not concerned in the subsequent disposal of the purchase money. No doubt a vendor would prefer cash down to deferred payment, but vendors under the Purchase Acts have no choice. Before the Act of 1896, the guarantee deposit was universally compulsory. Now, under section 29 (1), it can be dispensed with, if the Land Commission thinks the security sufficient without it. No one who could get money down would sell under the Purchase Acts at all, and the sale of an estate under those Acts, even subject to the guarantee deposit, at least gets rid of the receiver, and turns the lands into money which, year by year, will be set more and more free, and which, until freed, will bear regular interest, instead of doubtful or vanishing rents. Ross, J., has not claimed any jurisdiction with respect to the guarantee deposit under section 40, which does not mention it from beginning to end. Every sale under the Purchase Acts effected by the Land Judge is subject to the same jurisdiction as to the guarantee deposit, and I am therefore unable to attach any weight whatever to arguments founded on the provisions dealing with the guarantee deposit, as applied to section 40, which does not deal with that subject at all. But the jurisdiction over the deposit still gives additional security for the advance.

The many references which have been made to the sections in the Act of 1896, and in the previous Acts, which name the Land Commission as the authority to sanction advances, either assume the question at issue, or are quite beside it. It is the duty of the Land Judge to exercise the jurisdiction which section 40 confers upon him, with the same regard to the sufficiency of the security as if he were the Land Commission acting under the sections which confer jurisdiction upon that tribunal. The question is whether section 40 confers the jurisdiction upon the Land Judge. Unless it does, it is unworkable. If it does, the other sections

which confer the same jurisdiction on the Land Commission are immaterial.

I have still to make some remarks upon the nature and efficacy of the report made by the two Commissioners under sub-sect. (*a*). It seems to me to be exactly analogous to the inspection and report which the Land Commission obtain in other cases, and the direction to furnish it to the Land Judge indicates that, in dealing with it, he occupies a position analogous to that of the Land Commission in other cases. I have already observed upon the important bearing, upon the question of jurisdiction, of the direction in sub-sect. (*b*), that the Land Judge shall consider the report with other offers in fixing the price. But I wish now to quote some passages from the judgment of Bewley, J., which appear to me to afford the most conclusive proof that, neither upon principle nor in practice, can the report be treated as even a provisional adjudication upon the question either of price or of advance. "It is plain," he says, "that the circumstances of a tenant seeking an advance to purchase his holding, and his solvency, must be important elements in estimating the sufficiency of the security for the advance." Again he quotes from an official letter of his Commission: "The circumstances of a tenant seeking an advance from the Land Commission to purchase his holding constitute a material element in estimating the sufficiency of the security for a proposed advance; and if, after the date of inspection for the purpose of a report under the 40th section, all a tenant's stock and crops are seized and sold, and the sale of the holding is afterwards completed on the recommendation contained in the Commissioners' report, without any notification to them of the alteration in the circumstances of the tenant, the advance will have been made on a mistaken basis, and *the security for the purchase annuity will, in many cases, be seriously imperilled.*"

When the Attorney-General was contending that the advance ought to be sanctioned by the Land Commission before, and not after, the offer was made to the tenants, I called his attention to Judge Bewley's reasoning upon this point, and I asked him what he said to these passages in the judgment which he was officially supposed to be supporting. His answer was in these words:— "I say that they are all wrong." I have since heard suggestions that

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Judge Bewley is mistaken, and that the only security which the Land Commission ought to consider upon the question of sufficiency is the actual holding as a parcel of land, and not the personal credit, or the probable solvency, of the tenant who applies for the advance. Until I heard it, I could not have believed that such an interpretation could be put upon a code, of which the professed object is to enable occupying tenants to acquire the fee-simple of their own holdings, and, having acquired them, to continue to live upon them, and to work them, as solvent men.

If the goodwill of the tenant, and all the motives which he has to cling to his holding, to improve it, and to thrive upon it, are to be disregarded, in estimating the amount which he can be reasonably expected to repay from year to year, in purchase instalments, the realities of life must be ignored. But more—the Land Commission must be held at liberty to make advances, upon the security of the land alone, to penniless borrowers, with the certainty, or at least at the imminent risk, of being obliged to enforce the security by becoming evicting mortgagees exercising powers of sale, in place of being public lenders aiding occupying tenants to acquire and keep their holdings. This point has a direct bearing upon the very question before us. One of the subjects which is expressly within the exclusive jurisdiction of the Land Judge is fixing "payment of part of the price in cash." It is conceded that in the present case Ross, J., might have required the difference between the £2365 of the report and the £2589 of the offer—viz. £224—to be paid in cash. Those who treat the report as binding the Land Commission, contend that the Commission could not have refused to advance the £2368, if Ross, J., had directed the tenants to pay the £224 in cash. Bewley, J., protests against that contention, and, in my opinion, with unanswerable force. The amount required in cash would have been small in this case, in others it might be large; but, large or small, it would affect the solvency of the tenant, and the sufficiency of the security. Bewley, J., shows that the effect of allowing the Land Judge to require any payment at all in cash, without giving the Land Commission an opportunity of considering whether they can with safety make the advance proposed in the report, would be "to allow, or rather compel, the Land Commission to make the advance to a tenant

who is practically a pauper, and who will probably fail to pay the very first instalment of the purchase annuity."

I conclude my remarks upon the interpretation of sect. 40, which attaches importance to the report, by quoting Bewley, J.'s, statement of what those reports really are. "It would be a mistake," he says, "to suppose that the Land Commission always look upon a proper price as equivalent to the sum that can be safely advanced. The prices which the Commission state in their report, under sect. 40, are those which are, in their opinion, proper to be paid by the tenant for the interest sold to him, *whether an advance is to be made or not.* The notion that the prices are fixed by them on such a valuation as would be made by persons acting for a timid lender is a delusion." Therefore he treats all the suggestions that we have heard, based upon the price stated in the report as an adjudication of the sufficiency of the security, according to the practice and according to the understanding of the Land Commission, as delusive and mistaken.

For the reasons which I have stated, I cannot sustain the order appealed from. I think that it ought to be discharged, and that the applications of the tenants thould be remitted to the Land Commission to complete the sales. I should add, however, that the judgment of Ross, J., does not make it clear to me that, in this particular case, he fully realised the responsibility which, in my view, rested on him, of satisfying himself judicially of the sufficiency of the security. In the absence of an appeal, it should be assumed that he did so, and possibly his order could not be questioned. Yet it might perhaps have been right, if my view had prevailed, to give an opportunity for appealing, after this Court had defined his duty in that respect. If there was no appeal, the sum of £224 would be the maximum amount which could be imperilled; and, in all future cases, he would have had the guidance of this Court as to the extent of his duty to consider the sufficiency of the security, before making any offer which required an advance of land stock. The construction which has commended itself to the minority of the Court would have made it possible to work sect. 40, and at the same time would have safeguarded the Treasury quite as effectually as the opposite construction, if not more so. I regret that our view has not prevailed, and that the decision now pronounced has

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reduced the Land Judge in working sect. 40, to a position of dependence, and the legislation to a condition of confusion, for which I cannot find any sufficient warrant or any precedent.

WALKER, L.J.:—

I concur with the Lord Chancellor and those of my colleagues who have agreed with him.

The important question involved in the case is whether when the Land Judge, under the provisions of the 40th section, makes an offer to a tenant to sell at a certain price, naming, at least in part, land stock, the amount of which he purports to fix, the Land Commission are bound to advance that named amount of Guaranteed Land Stock for the purposes of the purchase, though they who are to issue the land stock are not satisfied that the security is sufficient, and though it is their duty to retain out of the stock a guarantee deposit, the amount of which is to be measured by their estimate of the sufficiency of the security offered?

It has not, as far as I am aware, been argued that the Land Judge can fix, or alter, or control the position of the stock which can be impounded, or must be provided, as security for the whole.

The Land Judge, when he has arrived at what he considers a proper price for the tenant to pay, makes an offer to him to sell.

Before we can determine whether the Act of 1896 has altered the pre-existing law, and transferred to the Land Judge for this purpose the powers and responsibility of the Land Commission, we must carefully consider the language of the section, and try and gather from it the status which is by it attributed to a tenant who accepts the offer. This offer is communicated through the Land Commission, and then follow the words contained in (*c*), which have been read so often that I forbear from reading them again. He is deemed to have agreed. There are apparently three classes of sales under the Land Purchase Acts—1. When the tenant agrees with his landlord to buy; 2, when the tenant agrees by private offer to buy from the Land Judge, in which case the Land Judge is, in the words of the Act, "deemed to be" a landlord selling for the purpose of advances; and 3, the case of the attributed status arising under the 40th section to a tenant after the

offer—a status which we have to ascertain. Now, as the words are within the "meaning of the Land Purchase Acts," we must consider what these Acts are, and their effect upon the question we have to decide.

The Land Purchase Acts mentioned in sect. 40 are by express definition a code of eleven Acts, beginning in 1870. The code includes such portion of the Act of 1896 as deals with Land Purchase, and that contribution is contained in the sections 25 to 42. The first consideration is what the law upon the subject we are considering was under the Land Purchase code on the 12th August, 1896, and secondly, what, if any, is the alteration made. There is no doubt that in all those Acts there is a condition precedent contained that the body who advance the money must be satisfied that they have sufficient security. They act under the control of the Treasury, who are the real paymasters; and when the advance of the whole purchase-money was first authorized there was a condition added that a guarantee deposit should be retained — a retention made obligatory in all cases by sect. 23 of the Act of 1891. All agreements for purchase involved the condition that the purchasing tenant shall get the advance from the Land Commission, and the right to specific performance of the inchoate agreement only arose when the advance was sanctioned (sect. 22, Land Purchase Act, 1887); but the agreement itself, as distinct from the carrying it out, had an earlier existence, and the application for advance and sanction of advance were subsequent steps in the stages of completion under the Land Purchase Acts.

The alterations made by the Land Purchase Act of 1891 and the pre-existing code are of importance, as they connect the Land Commission and the Treasury and Executive with the making of the advances, and create a great financial department. Under the Land Purchase Act, 1891, Guaranteed Land Stock takes the place of cash for the purposes both of advances and guarantee deposits. A selling landlord is bound to accept it as equal in value to the nominal amount thereof, and a Land Judge selling to a tenant may similarly accept it. This stock is created by the Treasury and issued by the Land Commission. For its purposes a sinking fund is created, and a guarantee fund established, under the direc-

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tion and control of the Treasury. To this guarantee fund there is a contributing liability of counties, to be ultimately adjusted, with the advice of the Treasury, by the action of the Lord Lieutenant; but the foundation of the working of the Act is the Land Purchase Account, which the Land Commission are required to establish. It is made imperative on the Land Commission, when an advance under the Land Purchase Acts exceeds three-fourths of the purchase-money, to retain a guarantee deposit out of the advance, unless otherwise provided; and the 26th section makes it the duty of the inspector appointed by the Land Commission to report whether the holding affords sufficient security for the advance applied for. Further, the character of the fund, as created and guaranteed, is such that the Lord Lieutenant is given the right of challenging by appeal the adequacy of the security for an advance (sect. 29, sub-sect. 4). It seems to me that on the day of the passing of the Act of 1896 the Land Commission were expressly charged with the responsibility and power of controlling the amount of all advances; (2) that they only had the departmental knowledge which would enable them to discharge the duty; and (3) that they only had the contemplated machinery under their control, which would enable them to acquire knowledge as to the sufficiency of the security as to which they are trusted by the Executive and Treasury.

Now, the ten Acts constituting the Land Purchase Code as it stood in 1896 are carried into and made one with the Land Purchase compartment (Part III.) of the Act of 1896, which begins with sect. 25 and ends with sect. 42. One would expect, if so great a transfer of the powers and responsibility of the Land Commission were intended, that express legislation would be found. The Acts must work together save as altered, and *a priori* there seems no reason for the alteration merely because the Land Judge asks the tenant to buy at the price he suggests, instead of waiting for the tenant to ask him to sell at his (the tenant's) price. If a sale cannot be carried out under the 40th section, and the Land Judge is obliged to sell under the old practice, and a tenant makes a private offer, which the Judge accepts, the Land Commission have control over the advance. One of the repeals made by the Act of 1896 illustrates forcibly the policy which is continued in it. It repeals the whole of sub-sect. 1 of the 24th section of the Act of

1881, except three lines, and it now reads—"The Land Commission, out of moneys in their hands, may, if satisfied with the security, advance sums to tenants for the purpose of enabling them to purchase their holdings." Thus this provision stands as a leading part of the code—a general power with a qualification of universal application.

While speaking of repeals, I may notice that sect. 3 of the Act of 1888, on which much stress was laid by Mr. Ronan, is repealed by the Act of 1896. But there are express alterations in the powers of the Land Commission. In the group of sects. 25–42, for instance, purchaser's insurance money is no longer to be payable; and under sect. 29 the Land Commission may dispense with the whole or any part of guarantee deposit, "if they think the security for the repayment of the advance is sufficient without it." This discretion, open to the last, is to be exercised, on making an advance, by an estimate of the sufficiency at any moment before the order, and I cannot see why, if the Land Judge was given plenary power, he had not jurisdiction given him over the guarantee deposit and its amount; because this vitally affects the interests of persons interested in the estate. Whether the whole or part, or what part, of the advance shall be impounded confessedly remains at the discretion of the Land Commission, exercisable according to their estimate of the sufficiency of the security after the Land Judge has named the price. No doubt, the tenant is not concerned as to the deposit, but the Land Judge is, and the purchase-money will not reach him for distribution, so far as the guarantee deposit is concerned, because of a supervening discretion in the body who are to supply the purchase-money. The language of sect. 31, sub-sect. 4, is also most important. "Where a holding is sold by the Land Judge to the tenant thereof, and an advance under the Land Purchase Acts is made for the purpose" —for that one purpose he is given the powers of the Land Commission.

Coming now to the 40th section, it starts with a provision which seems to me most material. It is mandatory on the Land Commission at the request of the Land Judge to make a report as to the price at and the conditions under which sales under the Land Purchase Acts can properly be made. In any view the Land Commission are recognised as the body

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who possess the information and can furnish the materials as to the working of the Land Purchase Acts. It is, I think, clear that report is intended to name the advance of land stock which in the opinion of the two Commissioners, can properly be made, and the guarantee deposit which ought to be retained under the Land Purchase Acts. The words, "The Land Purchase Acts," comprise the whole code included in the Act of 1896, and the word "properly" extends to the entire action under the code. But I do not think it was intended that the report should contain the final order or determination of the Land Commission as to the amount of advances or guarantee deposit. It was, I think, intended to contain a reasonable safe guide for the Land Judge so far as he would deal in fixing the price with a probable advance of land stock and retention of guarantee deposit, and enable him to judge how far he could draw on Government advances. With this information the Land Judge assumes the position of vendor. I cannot see in sub-section (*c*) any other position given to him than that of a Judge selling an estate to the best advantage for the incumbrancers and owners, but fettered by the knowledge that the purchase-money must come in great part, at all events, out of a public purse of which others hold the strings. He is not put in the place of the Land Commission, nor is he even in words charged with any duty to the Treasury of considering the sufficiency of the security.

I do not find in the judgment of Judge Ross that he exercised any judgment on the sufficiency of the security for the advance.

I think it would be strange if there were different rules applicable to the powers of the Land Commission in working out sales on the same estate. There will scarcely ever be a case in which there will not be tenancies which are excluded by (*g*) from the machinery of the offer by the Judge to the tenants, and in which therefore he must seek offers from the tenants. In *Harkness' Estate*, now before us, private offers are directed to be advertised for in several cases. There the Land Judge will have to determine what price he will agree to take, but the amount of advance confessedly rests within the control of the Commission. Again, a solvent estate may have the 40th section applied to it immediately after the absolute order for sale is made, and in a petition matter where the solvent owner is petitioner, and there the owner

may be the only person interested in the proceeds. Is not that case in substance one of an owner selling to the tenants whom he approaches through the Judge?

I see nothing to prevent the Land Judge, if he thinks more land stock might be advanced, communicating with the Land Commission before the price is actually named or the application formulated, and obtaining possibly a concession which will make the offer when made workable. We must, however, determine which tribunal is the master of the situation.

We now come to a critical examination of divisions (*a*), (*b*), (*c*), and (*d*), of the 40th section, sub-section 1. If he were about to accept a private offer made by a tenant when he knew that State money should supply, at all events in great part, the purchase-money, it would not be unreasonable that he should seek information as to what would likely be the action of those who had to supply the money; so when he is going, as he must, to make an offer, not at a public sale, to the tenants, it is not unreasonable, that he should obtain similar information before he formulates the offer. In my opinion "price at, and the conditions under which," in (*a*) must mean the amount of advance in land stock, and amount of retention in guarantee deposits, which the discretion vested in the Land Commission under the Land Purchase Acts shows to be proper. There, for the time, the function of the Land Commission ends. The Land Judge then intervenes with the view of seeking, as he is bound to seek, in the first instance, from the tenants an agreement for purchase "within the meaning of the Land Purchase Acts." I use the very words of division (*c*).

All the deliberations and actions of the Land Judge under (*b*) are made after "considering the report." It is clear that he may, if he thinks it right, name a price, and I mean by price a sum in money, larger than a sale under the Land Purchase Acts according to the report should properly be made at. That in result, according to the view I take of the section, may or may not make the proceeding abortive. It will not, if the tenant elects to pay in cash the difference over the State advance, and it will not be abortive if the Land Commission, exercising their discretion, ultimately accede to what the Land Judge names. I go with the arguments for the appellants to the extent that I think "conditions" in (*b*) means

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conditions imposed on the tenant, and attached to his acceptance if he gives it, and not the conditions accruing under the Land Purchase Acts mentioned in (*a*).

Now, again, here the function of the Land Judge ends, and the case is remitted to the Land Commission. They ask the tenant will he agree to buy, and if he chooses he tells the Land Commission that he agrees to do so; and now come the critical words, "and then on fulfilment of the conditions the said person shall be deemed to have agreed to purchase the holding within the meaning of the Land Purchase Acts, and the sale shall be completed accordingly." I think that the words "on fulfilment of the conditions" refer to the conditions in (*c*), and that the tenant does not even become an agreeing person till these conditions are fulfilled, if there are any, though he was conditionally an agreeing person in the interval. But what then is his status—no more than this, that he is deemed to have agreed to purchase within the meaning of the Land Purchase Acts. What is the status of a person who had actually agreed to purchase within the meaning of these Acts? Under these Acts contract always waited for its fulfilment an advance under the discretion of the Land Commission. That was the position of him who actually agreed, so of him who is deemed. From the moment of acceptance the provisions of the Land Purchase Acts attach to him as an agreeing person. "And the sale shall be completed accordingly," means, I think, "and the sale shall be carried into effect under those Acts, and subject to their provisions."

I think we can find in the sections of the Act of 1896, which form its Land Purchase Part, assistance as to what is the true construction of these three lines in division (*b*). I may mention that section 35 of this part affords the strongest affirmation of the general controlling powers of the Land Commission.

I have referred already to section 29 dealing with the guarantee deposit. In clause (*d*) of the sub-section we find "and this section, and the Land Purchase Acts shall apply accordingly," which are, I think, a translation of the words "and the sale shall be completed accordingly." I also find a strong argument in the language of sect. 41, occurring as it does in the Land Purchase Part, and next in order to sect. 40: "Any person aggrieved by the order of a Land

Commissioner acting alone in carrying the Land Purchase Acts as amended by this Act into effect"—that is an order to be made subsequently to an agreement; and to understand sect. 41, it must be read in connection with sect. 29 of the Act of 1891, which is in part repealed by the Act of 1896. As unrepealed it was that any order of the Land Commission in carrying the Land Purchase Acts into effect shall, in the first instance, be made by a Commissioner sitting alone, and then the 41st section says that any person aggrieved by the order of the Land Commissioner acting alone in carrying the Land Purchase Acts, as amended by this Act, into effect, shall have certain rights of appeal. "Carrying into effect" is a process subsequent to agreement. I have shown that sect. 29 of the Act of 1891 includes the Lord Lieutenant, if he thinks that there has been a hasty sanction, and if the view of Judge Ross is right, the Lord Lieutenant is deprived of his former right. In my opinion this 41st section applies to, and includes, the working out of an offer through the Land Commission after acceptance.

For these reasons, though I should be perfectly satisfied if the jurisdiction claimed by Judge Ross were vested in him subject to the appeal to this Court, I do not think it has been transferred to him from the Land Commission, and I am of opinion that in all the sales under the 40th section, the Land Commission retain the powers and duty which admittedly they have in the case of all other sales to tenants which are carried out under the Land Purchase Acts.

Holmes, L. J. :—

After six Judges have expressed their views, it is unlikely that a seventh can add anything valuable to what has been already said. Placed in such a position, I should as a general rule confine myself to stating the conclusion I had come to; but the 40th section of the Land Law (Ireland), Act 1896, seems to bid defiance to general rules. For a second time in its brief history the full Court of Appeal has been called together to settle a difficulty of construction, so important, and at the same time so obvious, that it is impossible to understand how it escaped the draftsman's eye; and for a second time, exhaustive debate has resulted in a conflict of decision.

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If there was any assurance that the judgments now being delivered were to bring us to a point "where after these voices, there is peace," I should gladly anticipate that happy state by immediate silence; but as the course of procedure consequent on this decision can hardly fail to develop into further litigation or legislation, I propose to deal with the subject in some detail.

The question for decision depends primarily and principally upon the construction of the section of the Act of 1896 to which I have referred, and little assistance can be obtained from a critical examination of other provisions of this or kindred statutes. There are, however, some general features of what may be called the Land Purchase Code that may serve as a guide to the meaning of a section which was undoubtedly intended to introduce a new principle.

The policy and object of the several Land Purchase Acts from that of 1870, down to that of 1896, are to enable tenants by means of pecuniary aid from the State to purchase their holdings from their landlords. The form in which this aid is afforded is by a loan repayable on easy terms and secured on the purchased lands. The successive amendments of the first enactment supply ample evidence that the parties interested were not disposed to use these facilities for purchase with the eagerness which Parliament thought desirable. Originally not more than two-thirds of the purchase money was obtainable. In 1881, this was increased to three-fourths; and at length in 1885, it became possible for the tenant to borrow the whole. Since then, there have been, I believe, at least six amending Acts; and the inference from the entire code—an inference presumably corresponding with the results of experience and present to the legislating mind when enacting the 40th section—is that tenants in this country will only purchase their holdings if the whole of the purchase money is advanced by the State.

Except in cases under the 40th section, the price is arrived at by agreement between the landlord and tenant before an application for the loan is made. As the sale is only to be carried out in the event of the loan being obtained, the contract is necessarily conditional in the first instance, and it becomes absolute on the advance being sanctioned. The duty of giving

or withholding this sanction is imposed on the Land Commission; and as might be expected it is performed judicially. It is carried out by an order of one Commissioner after receiving a report from an inspector in a prescribed form, and after hearing evidence and arguments from the parties, if they so desire, and the order so made is subject to reconsideration on appeal by the judicial Commissioner and two other Commissioners. It seemed to be assumed by the Attorney-General, that the only duty of the Land Commission is a duty to his clients, the Treasury, to see that there was adequate security for the loan. Such a notion rests on the obvious fallacy that there is no one interested in these loans except the national lender. The Land Purchase Acts were passed for the benefit of tenants; and every tenant who desires to purchase has a vital interest in their proper administration. If, on the one hand, there ought to be sufficient security for the money advanced, there ought, on the other, to be as much of the purchase money advanced as is sufficiently secured by the lands. Accordingly the greatest care is taken that in adjudicating on an advance the Land Commission proceeds with the safeguards of full inquiry, sworn evidence, and arguments on behalf of the persons interested, in the absence of which the decision of any human tribunal goes forth without authority. It is to be observed that while the element of agreement protects the landlord and tenant from being forced into any contract which they are not willing to accept, the Land Commission, by controlling the amount of the loan, can practically regulate the price in all cases in which there is a sale. The judgment of Mr. Justice Bewley shows the extent to which the Land Commission regards the price and loan to be mutually dependent; and it has been I believe its practice to refuse a loan altogether where it considers the price too high. In such cases, the parties must either treat with each other anew, on the basis of the views of the Land Commission, or allow the proposed sale to drop.

It is also to be noted that the arrangement between landlord and tenant cannot be properly described as an agreement within the meaning of the Land Purchase Acts until the loan is sanctioned. Up to that time it is merely a conditional contract between two individuals, entered into, doubtless, in view of an

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application to the Land Commission; but it is only when the order of approval is made that the Acts can be said to apply to the arrangement, so as to make it an agreement within their meaning. There is only one other general feature of this code to which it is necessary to refer. From an early period of its history, the Land Judge has been authorized to sell pursuant to its provisions to tenants their holdings on estates under his control. He is made by definition a landlord in regard to such tenants, and the sale is carried out in the usual manner, the Land Judge being empowered to accept payment in land stock, and the Land Commission being at liberty to retain portion of the price as a guarantee deposit.

The 40th section of the Act of 1896 is a new departure, the principal characteristics of which are a compulsory offer to the tenants to whom the section applies to sell to them under the Land Purchase Acts their respective holdings at the prices specified in the offer, and a possible compulsory acceptance of such offer by some of those tenants. The nature of this new departure made it necessary to provide machinery for fixing the price and the amount of State aid, different in some respects from that under which other purchases under the Acts are carried out. A system dependent entirely or in part on agreement was no longer applicable, when the element of agreement was taken away. Some change was needed; and the nature of the change is to be gathered from the section itself, read with such light as may be afforded by the leading provisions of the code.

It sometimes happens that men as respectable as their fellows acquire, for some wholly inadequate reason, an evil reputation from which they can never free themselves. The same thing may be said about Acts of Parliament. The Land Law (Ireland) Act, 1896, from the time it became law, has been proverbial for the clumsiness of its construction, the obscurity of its language, and the want of foresight in its provisions. In my own very limited experience of it, I have not found it so much worse than some other statutes. The question raised in *Owen's Estate* (1) was undoubtedly a difficult one; but once it was decided, the interpretation of the 40th section becomes in my judgment comparatively easy. The language is familiar and

(1) [1897] 1 I. R. 200.

simple; and if followed sentence by sentence, and clause by clause, it leads to a most reasonable conclusion. This is the second good word that has been spoken to-day about the drafting of this statute; but candour obliges me to add that (as far as the 40th section is concerned) what I have said assumes that the meaning which I give it is what was intended by its framers; for if any of the other suggested constructions is what was contemplated, it is the most unconvincing specimen of the draftsman's art I have ever met. It is not only inadequate but misleading; and it is not my fault if I have failed to discover a hidden meaning which is certainly not expressed, nor, as far as I can see, even obscurely indicated.

Coming now to the terms of the section, it is important to observe that, while it contains many minute details, and is especially specific as to the mode of fixing the price and framing the offer to the tenants, there is no reference, from its beginning to its end, to the Government loan, which is undoubtedly the essential feature of every sale under the Land Purchase Acts. The only reasonable explanation of this silence is that it was assumed that as a general rule the full price was to be advanced. I have already pointed out that the inference from the successive changes in the Land Purchase Code is, that Irish tenants will only purchase their holdings if the whole of the purchase-money is provided, and that this must have been present to the mind of the Legislature when the 40th section was enacted. It was therefore natural that the legislation should be on the basis that the full price was to be lent, except in cases, likely to be exceptional, where for special reasons it was desirable that part should be paid by the tenant. It will be seen that this is precisely what has been provided.

Another peculiarity of the 40th section is, that in cases where there is to be a compulsory offer, the Land Judge is no longer placed in the relation of landlord to the tenant, but remains a judicial functionary pure and simple. This contrast is especially marked in sub-sect. 2, which is merely an extension of the ordinary provisions relating to land purchase, and in which we find once more that the Land Judge is to be deemed the landlord.

The new machinery is to be found in sub-sect. 1, which is

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conveniently divided into seven clauses. The initial step is the request of the Land Judge, dealt with exhaustively in *Owen's Estate* (1). Then comes a report from two Commissioners, preceded by an inspection made either by themselves or by some person deputed for the purpose. "A report" is a well-known term in legal proceedings. There are reports from masters, reports from valuers, and in the Land Code itself, there is the report mentioned in the 48th section of the Act of 1881, of which so much has been recently heard in *Lord Gosford's Case* (2). We are familiar, too, with reports in every branch of administrative procedure. The Houses of Parliament, County Councils, Poor-Law Guardians, Public Boards of every kind, receive reports from committees. Directors report to their companies, business managers report to their principals. In all these cases, and in every other case that can be suggested, the report decides nothing and concludes nothing. It gives information, it suggests, it represents. It is for the authority to which the report is made to act on it, in whole or in part, or to reject it altogether. Such *prima facie* is the report spoken of in clause (*a*). It is to be a report *respecting* (1) the estate, (2) the circumstances thereof, (3) the price, and (4) the conditions under which the sale of the holdings to the tenants can properly be made. It is admitted that as regards the estate, the circumstances, and the price, it is a report in the ordinary sense of the word, and nothing more. Unless the most elementary principle of construction is rejected it must be a report in the same sense as regards the conditions. It is obviously intended that the report should be full and complete. The word "conditions" is wide enough to embrace all the terms of sale, including to what extent the purchase-money is to be advanced by the State. Being only a report, it may be supplemented or amended by a further report. But whether there be one document or more, whether the details be many or few, its end and main object are to assist another authority to come to a conclusion. Clause (*b*) shows that this authority is the Land Judge, whose duty as therein prscribed is to frame an offer, as a judicial act, after a judicial inquiry, in which the parties have an opportunity of offering evidence and argument, and in which the report is to be considered

(1) [1897] 1 I. R. 200. (2) Not reported.

along with every other available information. The offer must be an offer to sell the fee-simple of the holding discharged from the arrears of rent then due, at a price to be named by the Land Judge, and may also be subject to certain conditions.

The language of clause (*b*) states the nature of two of them with reasonable accuracy and precision. The words are:—"Subject to such conditions, whether as to the payment of part of the price in cash, or as to the offer to one tenant being conditional on the acceptance by other tenants of the offers made to them within a limited time, or otherwise." A sentence or phrase introduced by the word "whether" necessarily involves an alternative, and the only possible alternative to "whether as to the payment of part of the price in cash" is a direct negation—that is to say, "whether as to the payment of part of the price in cash *or not*."

The introduction of this as a possible condition demonstrates that the fixing of the price by the Land Judge carries with it a judicial determination by him of the amount of the advance. I have already given reasons for the inference that the Legislature assumed in this enactment that as a rule the entire of the purchase-money was to be advanced, and I shall hereinafter offer a still stronger reason for this inference, based on the provisions of clause (*d*). But in a few instances the sale ought only to proceed on the condition of the tenant providing part of the price in cash. The Land Judge is, therefore, empowered to make this one of the conditions.

Thus the construction of the whole clause becomes absolutely clear. The Land Judge determines, in the exercise of his judicial discretion, that a certain price is just and reasonable. He also determines, in the exercise of the same discretion, that it is just and reasonable that either no part of this price or a certain portion of it is to be paid in cash by the tenant. It follows, with the certainty of a mathematical demonstration, that he determines at the same time, in the exercise of the same discretion, that it is just and reasonable that in the one case the whole, and in the other the remainder, of the price is to be provided in land stock. In fact, his decision corresponds in this respect with the order of the Land Commission sanctioning an advance in cases not within the 40th section.

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The manifest object of the second specified condition is to prevent sales of part of an estate, or to isolated tenants, when such sales would be neither just nor reasonable. Here, also, it is difficult to suggest an alternative other than a direct negation. The final words, "or otherwise," are incapable of a strict construction, as they are ungrammatical and ambiguous. When they are taken in connection with the context, their natural effect is, I think, merely to supply in a compendious form the alternative to each of the two preceding clauses, thus confining the conditions to those specifically mentioned. It is also possible to construe them as signifying "or any other condition whatever." But even if the offer may be made subject to conditions other than those indicated, they, and each of them, must be such as the Land Judge "may consider reasonable and just, having regard to the interest of all persons interested in the estate." They must be conditions of which he judicially approves, and cannot include what may be called an automatic condition—that is to say, a condition that must always be inserted, irrespective of its reasonableness and justice.

The offer, as framed by the Land Judge, is to be communicated through the agency of the Land Commission to the tenants. No provision is made for informing them of the contents of the report, nor for the Land Commission altering the offer, adding anything to it, or accompanying it with any document, notice, or order of its own. Nor would this be necessary, if my construction of the section is correct. According to my view, the offer is complete in itself, containing everything that the tenants require to know preparatory to their entering into an absolute agreement. If a sufficient number of them accept, each one so accepting, on payment of such sum in cash, if any, as is stated in the offer, is deemed to have agreed to purchase his holding within the meaning of the Land Purchase Acts; and nothing remains to be done, for the purpose of carrying out the sale, save an inquiry into title in so far as it has not been already investigated, the preparation of the vesting order, and, finally, the issue by the Land Commission of the amount of land stock required to complete the purchase—a purely ministerial act, for which the offer framed by the Land Judge is the legal and sufficient warrant.

I have thus gone through clauses (*a*), (*b*), and (*c*), giving to each word and sentence a natural meaning, adding nothing and taking nothing away; and I pause to ask, Is not the result eminently reasonable, and are not the steps by which it is reached consistent with each other, and with the general provisions of the Acts? I began by saying that the policy of the section necessitated some change in the mode of fixing the price and the amount of the advance. I end by pointing out that this is effected by conferring on the Land Judge complete jurisdiction to do so, subject to what is substantially a plenary appeal.

It may be asked, why was this jurisdiction not given to the Land Commission? I answer, that if I were a legislator I might offer reasons for preferring one tribunal to another; but as I am a Judge it is a matter of indifference to me which has been selected. Of much greater importance than the particular tribunal to which the duty is entrusted is that provision should be made for performing it, with every means of arriving at a correct conclusion, and with due regard to those judicial safeguards that command respect. In this direction nothing is left wanting. The Land Judge is assisted not only by evidence and arguments adduced by the parties, but by the report of independent experts, and by a knowledge of the history of the estate which no one else possesses. He is placed in even a better position to protect the interests of the national lender than the Land Commission in the case of other sales under the Acts, and it is no less his duty to afford such protection. It would be neither reasonable nor just for him to frame an offer on the basis of a loan that would not be satisfactorily secured; and if the responsibility imposed on him is great, there is always the guarantee, inseparable from the position of a British Judge, that it will be honestly and adequately discharged.

No doubt it would have been possible for Parliament to divide the duty—to leave it to the Land Judge to fix the price, and to the Land Commission to settle the amount of the advance. But although such an enactment would have been within its powers, it would have hardly been consistent with its wisdom. It would have imposed upon heavily burdened estates a double cost; it would have separated two functions which are mutually depen-

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dent; and it would have been a departure in principle from the established system. In cases outside the 40th section the Land Commission, as I have already pointed out, by fixing the amount of the loan, practically controls the price. Unless the parties are willing to accept its view there can be no sale; and thus it is an adherence to the present practice, not a departure from it, to have one authority to settle both the price and loan.

In the Attorney-General's statement of his client's case, although it was marked with a vehemence unusual in a purely legal discussion, there were only two criticisms of the foregoing construction worthy of the name of arguments. One relates to the guarantee deposit, which I propose to deal with at a later period. The other is founded on the fact that the sum available for loans to tenants varies in different counties, and is limited in each; and that the Land Commission has peculiar means of knowledge of how the account stands for the time being. If it were left in the hands of the Land Judge to fix the amount, he might, argues the Attorney-General, authorise an advance which there would be no funds to meet. My answer is, that the knowledge in question is neither a secret nor exclusively possessed by the Land Commission; and there is no difficulty in the Land Judge ascertaining the state of the account from time to time, and at any time. Indeed, the Attorney-General admits that he is bound to know it for another purpose. The Attorney-General has shown conclusively that the Land Judge has no jurisdiction under the 40th section to frame an offer on the terms that all the price is to be paid in cash; and he draws the conclusion that when the funds in a particular county are exhausted no offer to tenants in that county can be made until more money is forthcoming. This presupposes that the Land Judge must know the state of the account before he takes the preliminary step of calling for a report.

Clause (*d*) is only remotely connected with the construction of the three previous clauses; but it affords one convincing argument in support of what I believe to be the keynote of the section—namely, that the full price is to be advanced as a rule, subject to rare exceptions when special circumstances may require a payment by the tenant. The object of this clause is to apply to a certain

extent compulsion to tenants, so as to prevent portion of an estate from remaining unsold when a large part of it has been disposed of under the section. It was, of course, intended to be acted on, and is to be applied to groups of tenants. Now, it can only be so applied when all the purchase-money is provided. I do not ground this observation on the apparent injustice of obliging persons to pay money who have not got it; for no such obligation is to be found in the section, as I, in common I believe with the majority of the Court, construe it. The condition to pay part of the purchase-money in cash is not a term of a contract that could be enforced. It is a condition in an offer which, even when accepted, does not become an agreement until the money is paid. Now, the tenants who may be ordered under clause (*d*) to be deemed to have accepted the offers are tenants who have already declined to accept them voluntarily. It would surely be the extreme of absurdity to make such an order, if it depended upon the same tenants themselves to make it effective by payment of cash.

I have now finished the observations which I desire to make regarding the interpretation of the section that commends itself to my mind. But the strength or infirmity of one construction can only be truly realized when it is contrasted with its rivals. When the question now under appeal came before the Land Commission, it was presented practically *ex parte*. As all parties interested were agreed, there was no *legitimus contradictor*; and under such circumstances it is neither unusual nor improper for the Judge to deal with the subject from the point of view of an opposing advocate. He arrived at the conclusion that after the offer had been communicated to and accepted by the tenants, it was necessary that a further application should be made to the Land Commission to sanction the advance; and that on such application it was the duty and within the jurisdiction of that Court to examine for itself the matter which the Land Judge had already purported to determine, and in case of difference of opinion to decline to act on the Land Judge's offer. Mr. Justice Bewley's final view, as I understand his judgment, was that the Land Judge had authority to frame the offer as he did; but he was clearly of opinion that the Land Commission was not bound to act

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upon it. The present appeal was therefore taken; and I believe that every member of the Court, knowing the importance of the issue involved, felt relieved when the Attorney-General asked permission to intervene for the purpose of opposing the appellants on behalf of the Treasury. The Attorney-General has taken up a clear and decided position in his argument He rejects entirely the view of Mr. Justice Bewley; and he suggests a construction of the section as different from his as it is from mine. His case, put forward after due consideration and representing, I have no doubt, the opinion of his clients as well as his own, is that the two Commissioners by their report, finally fix the amount of the advance. I am aware that he admits that the first report may be supplemented or altered, and he was even induced to say that an alteration could be effected in the course of oral communication—a statement of which Mr. Ronan took an advocate's advantage by describing it as a talk in a back parlour. But the real point relied on by the Attorney-General, from which he never receded, was that at some time before the Land Judge framed the offer, the two Commissioners were to fix the advance which could not afterwards be altered by either the Land Commission itself or by the Land Judge. It was the duty of the latter to settle the price; but in so far as it exceeded the loan prescribed by the two Commissioners, he was bound to provide that it should be paid in cash by the tenant. There is no ambiguity in this construction, and I content myself with stating the objections to it briefly and categorically. (1). It gives a meaning and functions to a report for which there is no parallel in either legal proceedings or in any other transactions of mankind. (2). It gives a double meaning to the report, making it a mere report respecting the estate, the circumstances, and the price, and making it a conclusive decision respecting the advance. (3). It causes the amount of the advance to be settled before the price is fixed, contrary to what is done in all other cases, and contrary to reason and convenience. (4). It settles the loan without judicial investigation or decision, in opposition to the existing practice, and contrary to the mode in which the business of legal tribunals is conducted. (5). It gives to clause (*b*) an interpretation so contradictory as to be unintelligible. There are two things in that clause that could not have been expressed more

clearly—one that the Land Judge is given an absolute judicial discretion in fixing the price—it is such a price as he may consider just and reasonable; the other that he is given an absolute judicial discretion to say whether any, and, if so, how much of that price is to be paid in cash; that also is to be decided according to his view of what is just and reasonable. But the construction of the Attorney-General deprives him of this last-mentioned discretion altogether, and substitutes for it the result of a sum in arithmetic. Having fixed the price, he is obliged to declare that when it exceeds the amount of the loan stated in the report, the difference must be paid in cash. (6). The consequence of this is to convert the hearing before the Land Judge into an empty form. He can only take one of two courses. Either he must adopt the price of the two Commissioners, however unjust it may appear to him, or he must increase it by inserting in the offer that the tenant is to pay the additional sum in cash—an offer which he knows will never be accepted. There will be no one in Court during one of these hearings, from the Attorney-General himself, if he is there on professional business, down to a solicitor's errand-boy that carries a message to his master, who will not know that the whole proceeding involving great expense to the parties and to the estate is simply a solemn nullity. Surely a British Judge has never in the history of our law been placed in such a humiliating position.

I thought at one time that I could conclude my judgment at this point. Having considered the two constructions presented in argument, and having given his reasons for accepting one and rejecting the other, there would, under ordinary circumstances, be an end of a Judge's duty. It sometimes happens—less frequently, however, than is generally supposed—that there occurs to the Court a view that has been overlooked by counsel. It then becomes its duty to examine it. According to my experience, it is a dangerous foundation for a judgment. But this is not what has happened in the present case. The Attorney-General, from the first, had before his mind the construction presented in the judgment of Mr. Justice Bewley, which, ordinarily speaking, would be upheld against the contention of the appellants. It was brought to his notice again and again during the hear-

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ing; and he deliberately—I might even say contemptuously—rejected it. He can only have taken this course either in obedience to instructions from his clients or from a conviction that the view suggested was logically impossible. Under these circumstances it would seem to me to be dangerous to rest the decision of the Court upon it, and I am glad that on this point I am in complete agreement with the distinguished counsel for the Treasury and Chief Law Officer of the Crown. At the same time, I feel bound to say that if I am obliged by some irresistible consideration to reject the plain meaning of the language of the section, this construction seems to me to be the most plausible and the least objectionable of any I have heard suggested. Up to a certain point it agrees, I believe with my own. The two concur in holding that the report neither decides nor concludes, that its function is only to assist the Land Judge in framing the offer, that the price and every other term in the offer are the result of the exercise of his judicial discretion, and that he must decide whether in his judgment the whole of the price, or if not the whole, what portion of it, is to be provided in land stock. It is however said that this last mentioned term is to be introduced in the form of a condition, the offer being made conditional on the Land Commission sanctioning the advance of land stock named therein.

This construction gets rid of all the objections to which that of the Attorney-General is open, and which I have enumerated under six heads. But it is exposed to objections scarcely less serious of a different kind.

1. There is no warrant in the words of the clause for a condition of this character. It is almost inconceivable, if the Legislature intended such a thing, that it would not have expressed it clearly and distinctly. But it is not merely *not expressed*, it is wholly inconsistent with the language used. I have already pointed out that every condition introduced into the offer is to be one which the Land Judge considers reasonable and just. But this condition is to be inserted in every offer, quite irrespective of his opinion as to its reasonableness or justice.

2. If the offer framed by the Land Judge is to be made conditional on the Land Commission sanctioning the loan as fixed

by him, how can it be explained that provision is not made for obtaining its decision before the offer is made to the tenant? It is clear that there is no such provision, and that if the approval of the Land Commission is necessary, it must be applied for after the offer has been accepted, the effect of which is to make the offer itself illusory.

3. This construction leads to abnormal consequences in the application of clause (*d*). The Land Judge is to make a hostile order declaring that an unwilling tenant is to be deemed to have accepted an offer that may itself turn out to be a nullity, because three-fourths of the tenants on the estate have accepted offers not one of which may be ever carried out.

4. After the offer has been framed by the Land Judge as the result of a judicial investigation carried out with much trouble and expense, the inquiry is to begin anew. There is another judicial hearing before a single Land Commissioner, to decide the amount of the advance, with a right of appeal to three Commissioners.

5. There is the danger of having two conflicting judicial determinations of the same matter in the same proceedings, arrived at by independent tribunals, each having jurisdiction, and each subject to appeal.

I have thus considered three constructions; and I naturally ask myself is there any other. I am now aware that there is a fourth which was not dealt with by Mr. Justice Bewley, nor referred to by the Attorney-General, and which I certainly should not have discovered for myself. It is, as far as I understand it, a combination of the other two. The report fixes, and yet it does not fix, the amount of the loan. The Land Judge and the tenant are bound by the sum reported, but the Land Commission itself is not bound. After the offer, which must be framed on the basis that no larger sum will be advanced, has been accepted, there is still to be the judicial hearing before the Land Commission, which may result in a determination different from what appears in the report. The peculiarity of this interpretation is that, while it avoids the risk of conflicting decisions, it concentrates against itself every other possible objection. The six objections to which the construction of the Attorney-General is open, are all, with a

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slight modification in the phraseology of the fourth, equally applicable to it. So, too, are the first four objections taken to the construction which I have attributed to Mr. Justice Bewley. It gives a novel meaning and function to a report; it makes the report serve for two inconsistent purposes; it upsets the existing practice by settling the maximum of the loan before the price is known; it also settles it without judicial investigation or discussion; it deprives the Land Judge of the discretion as to part payment in cash given him in express terms by clause (*b*), converting him in this matter into a mere *juge faineant* with the two Commissioners for mayors of his palace; it makes the hearing before him practically valueless; it makes the offer conditional on the Land Commission afterwards sanctioning the advance without any warrant for such a condition in the language of the clause; it leaves the tenant without any certainty as to the terms of the offer; and if he accepts it, he can only carry it out by further legal proceedings.

In addition to these objections common to the two other constructions, there is another peculiarly its own. In the view of the Attorney-General, the tenant, before he accepts the offer, knows from the report the precise amount of State aid on which he may calculate. In the view now under consideration, he is remitted to a judicial hearing at which the sum named in the report may be diminished or withheld altogether, but cannot be increased. If the price exceeds such sum, the condition of his acceptance is to pay the surplus in cash. Therefore, he ought not, and I venture to add will not, be listened to if he asks for more. But he may get much less. This is a point on which there ought to be no mistake. In political affairs, in the varying transactions of business and social life, compromise is permissible, and often honourable. But in defining the jurisdiction of a Judge, and in the discharge of his duty within the limits of his jurisdiction, there is no room for opportunism. When a Land Commissioner hears the application of the tenant to sanction the advance mentioned in the report and in his offer, the question, on the assumption that the suggested construction is correct, is for the first time dealt with judicially. It ought not to be a matter of surprise if the result then arrived

at differs materially from that of two Commissioners acting on such weak materials as an inspection made in the mode adopted in this case. Moreover, circumstances may have changed in the meantime. A well stocked farm may have been denuded by an execution, or the tenant may have been obliged to borrow the cash portion of the purchase-money at ruinous interest, on the security of a bill of sale. Besides, the judicial standpoint may be different. It may, no doubt, promote the easy despatch of business, and tend to diminish inconvenient friction, to have, as occurred in this case, one of the Reporting Commissioners to sit in judgment on his own report; but I doubt whether it is legal, and I am sure that it is unbecoming. It is even conceivable that a fastidious Commissioner might decline the position; and the colleague who would supply his place might take a wholly different view of the security. Then, indeed, there could be an appeal; and as, with the present number of Commissioners, one, or perhaps two, of the appellate Court must have joined in the report, there would be a chance of restoring its recommendations.

It is unnecessary to pursue this subject further, and I have no desire to anticipate these and many other questions which will come up in due time for decision. I have said enough to explain my dissent from the judgment of the Court, and at the same time to show that if the intention of the Legislature was (as in the future we are bound to assume) to place the fixing the amount of the loan in the power of the Land Commission, the 40th section has been framed in such a way as to make embarrassment, confusion, and consequent litigation unavoidable.

It is perhaps, under the circumstances, not out of place to say that it seems to be more for the Legislature than for the Courts of Law to place this portion of the Land Code on an intelligible and working basis.

I have only to add a few words on the subject of the guarantee deposit. It is clear, I think, that the Land Judge, in exercising whatever jurisdiction is conferred on him by the 40th section, acts as Land Judge alone, inasmuch as he is placed throughout the section in contradistinction to the Land Commission. I also think that, as the jurisdiction therein conferred is to frame an offer of sale to the tenants, it does not include any dealing with the guarantee

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deposit, which is a matter of no importance to the tenants, and ought not to form any part of the offer made to them. Therefore the guarantee deposit is left in the position in which it stands in cases outside the 40th section. As I understand that position, it is this:—There is a condition attached to making a loan that a portion of it, not being less than one-fifth of the advance, should be retained by the Land Commission as a guarantee deposit. The 29th sect. of the Act of 1896 authorises the Land Commission to dispense with the whole or any part of the guarantee deposit being made or retained; but this jurisdiction is given to the Land Commission, however that tribunal may be composed for the time being, and does not, as far as I can see, affect the construction of the 40th section. The amount of the guarantee deposit, in all cases outside this section, is settled by agreement between the landlord and tenant; and where the Land Judge sells to a tenant under the other provisions of the Act, it is settled between him, defined as landlord, and the Land Commission, in the same way as if he was an ordinary landlord. Of course, in so settling it, the Land Commission is the leading or dominant factor, as if an agreement is not arrived at the power of retention rests with it. I see no difficulty in applying the same procedure to cases under the 40th section, after the amount of the loan has been fixed by the Land Judge, when the time arrives for completing the sale.

The Attorney-General used as an argument against the construction which I have adopted, that the price cannot be properly fixed unless the amount of the advance to be retained as a guarantee deposit is known. It seems to me that in cases under the 40th section it is a very unimportant element. The estates within it, although ordered to be sold, cannot be sold in the ordinary way. The cardinal consideration is a sale; and even if a portion of or all the purchase-money is retained for a time, the persons interested will receive the dividends with much greater regularity and punctuality than the receiver could be expected to collect the rents.

I don't know whether the framers of the 40th section intended that it should have the effect which I give it regarding the guarantee deposit. I think, however, that it is the plain result of its

true construction. So that, even as I interpret it, the Land Commission still retains a most important means for protecting the Exchequer; and this protection minimises the importance to the Treasury, or the effect upon the security, of the question at issue between the Land Commission and the Land Judge, as to which of them is to exercise the jurisdiction, and to perform the duty of fixing the amount of the advance.

Solicitors for the appellants: *Baker & Ringwood.*
Solicitor for the Treasury: *Sir P. Coll.*

G. Y. D.

JOHNSTONE *v.* BUCKNALL (1).

Q. B. Div. 1898. May 18.

Practice—Garnishee—Judgment obtained in England—Judgments Extension Act, 1868.

A garnishee order can be made on foot of a judgment obtained in England, and subsequently extended to Ireland under the Judgments Extension Act, 1868.

MOTION on behalf of the plaintiff for a garnishee order.

On the 30th April, 1898, the plaintiff obtained judgment in England against the defendant for the sum of £82 15*s.* 10*d.* debt, and £5 14*s.* costs; and on the 10th May, 1898, the judgment was registered in the Queen's Bench Division for the above amount, together with £3 5*s.* costs of such registration. The defendant had no goods or chattels in this country capable of being seized in execution; but on the 14th April, 1898, he obtained two judgments against two different persons for sums considerably in excess of the amount of the plaintiff's judgment debt.

These judgments were unsatisfied, and the amounts thereof due to the defendant. The plaintiff now sought to attach these amounts.

(1) Before GIBSON, J.

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Redmond Carroll, in support of the motion :—

This application involves the question whether a garnishee order is the same as execution, because the jurisdiction of the Court in relation to a judgment extended to Ireland is limited "in so far only as relates to execution under this Act"; sect. 4 of the Judgments Extension Act, 1868. A garnishee order was "execution." Gen. Ord. XLV. which gives the right to attach debts, is almost a verbatim copy of the 63rd sect. of the Common Law Procedure Act, 1856. Under that section it was decided that an attachment of debts was execution; and that a judgment creditor must, when applying for a garnishee order, be in a position to issue execution; and that the judgment, if lapsed, must be revived before such an order could be made: Bewley and Naish, C. L. P. Acts, p. 336; *Baynard* v. *Simmons* (1); *Nolan* v. *Hornidge* (2). There does not appear to be any report of a decision since the Judicature Act governing this point.

The case of *In Re Watson* (3), in which it was held that proceedings under the Debtors Act for the purpose of enforcing a judgment, were not "execution," does not apply to this case, as such proceedings were clearly more than "execution."

GIBSON, J. :—

The question raised is whether a garnishee order can be made in respect of an English judgment registered in Ireland under the Judgment Extension Act, 1868; the practice has been, I believe, to make such orders. The 4th section of that statute gives jurisdiction only "so far as relates to execution under this Act." In *In re Watson* (3) it was held accordingly that a judgment summons under the Debtors Act, as it was not "execution," could not be maintained on a registered Irish judgment. This authority was approved of in *In re a Bankruptcy Notice* (4), where it was held that a registered judgment could not be made the foundation of a bankruptcy notice. The present case is distinguishable from these authorities; but I think that if the word "execution" in section 4 means an ordinary writ of execution, a garnishee order

(1) 24 L. J., Q. B. 253.
(2) I. R. 3 C. L. 48.
(3) [1893] 1 Q. B. 21.
(4) [1898] 1 Q. B. 383.

would not be within it. In *Fellows* v. *Thornton* (1) it was held that a garnishee order was not execution within the English Judicature order, and that therefore such order might be made though the judgment was over six years old. I think the opinion of Lord Coleridge in that case was plainly right, and I am unable to follow the reasoning attributed to Stephen, J. I am of opinion, however, that execution in section 4 is not restricted to writs of execution, but extends to such a remedy as a garnishee order, which was a well-known and direct means of enforcing a judgment at the time the Act of 1868 was passed, and was created by the very code which regulated the judgment. I shall, therefore, make the order.

Solicitor for the plaintiff: *J. Rose Byrne.*

J. P. B.

IN RE JAMES CALVERT.

Fixtures—Mortgage—Bills of Sale Acts.

C. took a lease of building ground on which he erected a shop, in which he carried on the trade of a chemist and druggist, having fitted up the premises with suitable trade fixtures, all of which were admittedly capable of being detached without injury to the freehold. After the annexation of the fixtures C. mortgaged the premises. In the mortgage the parcels were simply described as "building ground," with boundaries, &c., as in the lease, omitting any specific mention of the fixtures:—

Held, that the fixtures passed to the mortgagees; and further, that the mortgage did not come within the provisions of the Bills of Sale Acts.

MOTION on behalf of the assignees claiming that the fittings on the premises of the bankrupt situate at Market-street, Lurgan, and enumerated in the schedule to the notice of motion, were the property of the assignees of the bankrupt in this matter, and that the assignees might be at liberty to remove same from the premises and realize same for the benefit of the creditors.

(1) 14 Q. B. D. 335.

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The schedule to the notice of motion was as follows:—

First window enclosure with 2 screwed glass doors, 8 feet 6 inches long, in mahogany, and side mirrors also,* 8 glass shelves (1) all fastened by screws and detachable.

First side window 10 feet 6 inches long, with 3 glass doors and side mirror,* 9 glass shelves all screwed to 2 uprights in mahogany.

Second side window with 2 double glass doors,* 7 glass shelves, 2 upright mirrors, length 12 feet 3 inches, in mahogany, and all fastened by screws.

Third side window, outside decorated show sign 11 feet 6 inches.

* One Oppenheimer's walnut case inlaid with ivory 2 feet 11 inches long, by 1 foot 6 inches broad by 6 inches deep.

* One shop floor mahogany stand with glass lid on four castors 7 feet 5 inches long, by 2 feet 10 inches wide.

Left hand side wall fittings, all in mahogany, with a combination of drawers and open shelving lockers, pilasters, moulded cornice, carved pediments, centre mirror 3 feet 11 inches high, by 3 feet wide, length 35 feet 8 inches, height 8 feet 11 inches, all fastened to wall by screws.

Back wall or end of shop, all open mahogany shelving with pilasters and moulded cornice 13 feet 10 inches long, by 8 feet 11 inches high.

Long counter running parallel with side wall, length 18 feet 5 inches, height 2 feet 11 inches, width 2 feet 2 inches, with 2 flat glass cases on top, 2 handsome upright cases at each end, each with a mirror and with open shelving and drawers, all in mahogany, fastened with screws.

One dispensing screen fronted with 6 glass cases, sponge case and marble slab on top, with shelving at back for dispensing, length 6 feet 9 inches, height 6 feet 7 inches, depth 3 feet 3 inches.

Behind dispensing screen, working counter, length 6 feet 8 inches, width 2 feet, 3 feet high, and fitted with open shelving and drawers.

Office at end of the dispensing screen with mirror-fronted door

(1) The articles to which an asterisk is prefixed were admitted by the mortgagees not to be fixtures.

2 feet 9 inches wide, 5 feet 3 inches high, with moulded top and glass partition 11 feet 9 inches long, and 5 feet 3 inches high.

Office desk with mahogany drawers, length 5 feet 6 inches, height 4 feet.

* An office safe by C. Price & Co., with 2 drawers and shelf, 2 feet 4 inches high, 1 foot 8 inches wide and 1 foot 6 inches deep.

Four incandescent gas clusters of 2 lights each, and one of 3 lights.

The bankrupt was the lessee under a lease, dated 19th February, 1894, of certain hereditaments and premises in the town of Lurgan, on which he had built a shop, where he had carried on business for some years as a chemist and druggist. On the 16th November, 1896, he executed a mortgage of these premises to the Belfast Banking Company, Limited, and the Bank, under the power of sale contained in their mortgage, sold the premises to the Ulster Chemists, Limited. The shop fittings or fixtures in question were not specifically mentioned in the mortgage from Calvert to the Bank, in which the premises were merely described as "building ground," following the description of them in the lease under which Calvert himself held. The Ulster Chemists, Limited, resisted the motion except as regards the articles marked with asterisks.

Ignatius O'Brien for the assignees, referred to the Bills of Sale (Ireland) Act, 1879, sect. 4, and argued that the mortgage to the Bank not having been registered under the Acts could not operate to transfer the property or the fixtures. It was a question of intention as between mortgagor and mortgagee, and it was clearly not the intention of the parties in this case that the shop fittings should pass under the mortgage to the Bank. [Counsel cited *Viscount Hill* v. *Bullock* (1), where a bird gallery in a settled mansion-house contained a valuable collection, commenced over sixty years ago, of stuffed birds, which were attached to movable wooden trays, placed in iron glass-fronted cases affixed to the walls of the gallery, and in an action between the present tenant for life of the mansion-house, and the trustee in bankruptcy of the

(1) [1897] 2 Ch. 482.

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late tenant for life, it was held by the English Court of Appeal, affirming the decision of Kekewich, J., that the contents of the cases were not to be treated as annexed to the freehold, but were movable personal chattels, and as such belonged to the trustee in bankruptcy of the late tenant for life.]

Watts, for the Ulster Chemists, Limited, on the point as to the Bills of Sale Act: In *In re Yates* (1), and *In re Brooke* (2), it had been held that, notwithstanding the Act, a valid security might be given upon "trade machinery" affixed to the land, by an ordinary mortgage of the land, without any express assignment or mention of such fixed trade machinery, or of fixtures generally (which, by the general law, and *a fortiori*, under the Conveyancing Act, 1881, sect. 6, pass by a conveyance of the land). The Ulster Chemists, Limited, claimed to be entitled (as purchasers from the mortgagees) to all the articles enumerated in the schedule to the assignees' notice of motion, which were attached by screws or otherwise fixed to the shop floor or walls; but they expressly disclaimed the Oppenheimer's walnut case, the shop floor mahogany stand on castors, the office safe, and the shelves in the window enclosures.

The law of fixtures as between landlord and tenant, has no application to the present case: *Cosby* v. *Shaw* (3). In the case of a conveyance of land by way of mortgage, as well as in that of a conveyance of any other description, all things annexed so as to become fixtures pass with the mortgaged premises, and constitute a part of the mortgagee's security, although the deed contains no mention of fixtures: *Longstaff* v. *Meagoe* (4); *Climie* v. *Wood* (5); and it makes no difference that the fixtures, or some of them, may have been annexed by the mortgagor subsequent to the mortgage; for the mortgagee or his assignee is entitled to everything he finds affixed to the mortgaged premises: *Walmsley* v. *Milne* (6).

March 11.

BOYD, J.:—

The assignees have served a notice of motion claiming to be entitled to certain shop fittings and fixtures in the shop of the bank-

(1) 38 Ch. D. 112.
(2) [1894] 2 Ch. 600.
(3) 23 L. R. Ir. 181, 193.
(4) 2 A. & E. 167.
(5) L. R. 4 Ex. 328.
(6) 7 C. B. (N. S.) 115, 138.

rupt. These articles so claimed are enumerated in the schedule to the affidavit of William Patterson Evans, filed 22nd Feb., 1898. The right of the assignees to these articles is disputed in the affidavit filed by the Ulster Chemists, Limited; and, in an affidavit of Samuel Gibson (the managing director of the said Company), dated the 21st February, 1898, he claims all of the said articles (except those mentioned in the fourth paragraph) as being trade fixtures, which have been annexed to the freehold for the more convenient using of them, and not to improve the inheritance. All of the articles so claimed by the Company are the ordinary fittings of a chemist's shop, and are merely fastened with screws to the floor or walls of the shop, and could easily be removed without appreciable damage to the freehold.

The Company's claim arises under an assignment made to them by the Belfast Banking Company.

On the 16th November, 1896, the said James Calvert executed a mortgage to the said Banking Company of the tenements and premises comprised in, and granted by, a certain indenture of lease, dated the 19th of February, 1894, made between the Lurgan Real Property Company, Limited, of the one part, and the mortgagor of the other part. The hereditaments and premises described in this lease are merely a piece or parcel of building ground, and no mention is made of buildings, fixtures, or fittings being on the land. All the shop fittings now claimed by the Company were supplied to the bankrupt in November, 1895, or shortly afterwards, by the firm of Evans & Co., of Liverpool.

The assignees contend that the shop fittings being only affixed to the premises by small screws are not fixtures, and did not pass to the mortgagees. They also say that there was no intention that they should pass under the mortgage; and that they are chattels within the Bills of Sale Act, and required a bill of sale to transfer them.

The Company contend that they were affixed to the freehold, and passed to the mortgagees.

As to the first point raised by the assignees, viz. that the articles in dispute are not fixtures, I am clearly of opinion that they are fixtures, which, though removable by a tenant as against his landlord, pass to a mortgagee of the tenant under a mortgage

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of the premises to which they are affixed, though no mention is made of them in the mortgage, as in the present case. There are several cases which decide that a very slight attachment to the freehold will constitute articles fixtures, as between mortgagor and mortgagee, and that fittings erected by an occupying tenant for the convenience of his trade come within the category. In *Longbottom* v. *Berry* (1) the owner deposited his title deeds with a Banking Company, as an equitable mortgage to secure the balance of his account with them for the time being. Subsequently he erected a mill on the premises, and set up machinery for the purposes of his trade, and executed a bill of sale of all the machinery, the assignee having notice of the previous deposit of the deeds: it was held as between the mortgagees and the assignee, that all the machinery which was annexed to the floor, ceiling, and sides of the buildings in a *quasi* permanent manner by means of bolts and screws passed to the mortgagees, and that it made no difference that the object of the annexation was merely to steady the machines when in use, and that they could be removed without injury to them or the freehold, nor that the machines were in the nature of trade fixtures which, as between landlord and tenant, belong to the tenant.

Again, in *Boyd* v. *Shorrock* (2), it was held that looms nailed to the floor were fixtures. In this case Wood, V.-C., in his judgment, p. 78, says:—"If the tenant has affixed to the freehold, during his tenancy, articles in such a manner as to make it appear that during the term they are not to be removed, and that he regards them as attached to the property, according to his interest in the property, then, on any dealing by him with the property to which these articles are affixed, the Court would presume that he meant to deal with the property as it stood with all those things so attached, and to pass the property in its then condition."

He then adopts the definition of fixtures as given in *Ex parte Barclay* (3):—"By 'fixtures' we understand such things as are ordinarily affixed to the freehold for the convenience of the occupier, and which may be removed without material injury to the freehold, such will be machinery, using a generic term, and in houses, grates, cupboards, and other like things."

(1) L. R. 5 Q. B. 123. (2) L. R. 5 Eq. 72. (3) 5 D. M. & G. 410.

To the same effect are the decisions in *Meux* v. *Jacobs* (1); *Longbottom* v. *Berry* (2); *In re Richards* (3); and several other cases.

As to the second point raised by the assignees that there was no intention that the fixtures should pass to the mortgagees, I am also of opinion that it fails. The bankrupt was carrying on the business of a druggist on the premises, and had fitted them up for the purposes of his business. He became indebted to his bank; and to secure this debt and procure further advances, he mortgaged his business premises as already mentioned. I have no doubt that he intended to secure the bank in as full a manner as he could by the mortgage of the premises, and this would include his business fixtures.

The third contention of the assignees is that, as the mortgage included chattels, there should have been a bill of sale of them. I think this contention also fails. The mortgage does not mention any fixtures, and simply conveys the land, and incident thereto conveys such articles as are affixed to the freehold. Such conveyance does not, in my opinion, come within the provisions of the Bills of Sale Acts: see *In re Yates* (4); *In re Brooks* (5).

For these reasons I am of opinion the contention of the assignees fails on all points except as to the articles admitted not to be fixtures in the affidavit of Mr. Gibson. As the Company originally claimed too much I will give them no costs. The assignees to get their costs out of the estate.

Solicitors for the assignees: *Bennett Thompson & MacLaughlin.*
Solicitors for the Ulster Chemists, Limited: *C. & J. Black.*

W. G.

(1) L. R. 7 H. L. 481.
(2) L. R. 5 Q. B. 123.
(3) 38 L. J., Bankcy. 9.
(4) 38 Ch. D. 112.
(5) [1894] 2 Ch. 600.

Cr. Cas. Res. 1898.
May 12.

COUNTY OF TIPPERARY PRESENTMENT.

IN RE SUB-SHERIFF'S EXPENSES UNDER QUARTER SESSIONS JURORS' (IRELAND) ACT, 1897 (60 & 61 VICT. c. 20) (1).

Sub-Sheriff—Expenses under Quarter Sessions Jurors' (Ireland) Act, 1897—Presentment.

A presentment for defraying the expenses of a sub-sheriff under the Quarter Sessions Jurors' (Ireland) Act, 1897, must be confined to expenses actually incurred at the time.

CASE reserved by Mr. Justice Gibson, in reference to a presentment in favour of the sub-sheriff of Tipperary, under the Statute 60 & 61 Vict. c. 20.

The case was as follows :—

1. The sub-sheriff of the county Tipperary applied at last Spring Assizes to the Grand Jury of the South Riding, for a presentment for £24, being three-fifths of an estimated sum of £40, for expenses under the statute 60 & 61 Vict. c. 20. The balance of the said sum of £40, namely, £16, had been presented and fiated in the North Riding at the same Assizes, but without discussion before the Judge, as I was informed.

2. An Order in Council, dated 16th December, 1897, with rules, dated 18th December, 1897, had been made, putting the provisions of the statute in force in Tipperary.

3. There are three towns where criminal business is transacted at Quarter Sessions—Nenagh, Thurles, and Clonmel. The customary panel is from thirty-two to thirty-eight grand jurors, and fifty-five to eighty ordinary jurors. The sub-sheriff stated that the notices had to be ready three days before the respective days

(1) Before SIR P. O'BRIEN, L.C.J., ANDREWS, GIBSON, MADDEN, BOYD, and KENNY, JJ.

appointed for the trial of criminal cases; and that the barracks, of which there were from five to seven in each division, had to be posted, and that a substantial increase in the clerical expenses of his office was necessary. His estimate of expenses under the Act was £80 per annum, to be made up by two presentments of £40 at each Assizes. The £24 applied for was, as to £12, a prospective estimate, it not being alleged that more than £12 expenses could have been incurred up to the date of the Assizes. The actual expenses incurred up to date were not proved or vouched.

4. The Grand Jury, through their foreman, expressed the opinion (which I thought was clearly right), that the expenses referred to in the statute must have been actually incurred, and that they should be specified and vouched before the Grand Jury could be called upon to present.

5. As a presentment had been made in the North Riding, and as the question affected sheriffs generally, I was asked by the sub-sheriff to state a case.

6. The Grand Jury, without binding themselves by the estimate on any future occasion, passed a presentment in blank, to be filled in for £24 should it be decided that a presentment upon an estimate of past and future expenses was legal. It is to be taken for the purpose of this case that the estimate was reasonable and fair.

The question for the opinion of the Court is, whether the statute 60 & 61 Vict., c. 20, authorises a presentment for £24 upon a prospective estimate, or whether it is limited to past expenses actually incurred at the time of presentment.

J. G. GIBSON.

R. Brereton Barry, in support of the presentment.

Under sect. 2 of 60 & 61 Vict. c. 20, notice of intention to present an indictment must be served on the Clerk of the Peace three clear days before the day appointed for the trial of criminal business, and under section 3, if no such notice be lodged the Clerk of the Peace must report to the sheriff, and the sheriff must thereupon notify in the prescribed manner all jurors already summoned to attend the Court for such criminal business in the prescribed

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manner. This entails on the sheriff the necessity of having the notices ready, although the notification may not become necessary. Section 4 provides that the expenses of the sheriff shall be defrayed out of the county cess; and the Grand Jury may present such sum as they may deem reasonable. It is plain that the Grand Jury are given a wide discretion, and would not require every item to be vouched; and may take as a basis of calculation expenses already incurred, and present for future expenses on such basis.

Brett, for the Grand Jury of the South Riding of county Tipperary, was not called on.

SIR P. O'BRIEN, L.C.J., stated that it was the unanimous opinion of the Judges that the "expenses" provided for by section 4 of 60 & 61 Vict. c. 20, should be actually "incurred" before any presentment therefor could be made or fiated; and accordingly the answer to the first portion of the question reserved should be in the negative, that is, that there could be no prospective estimate of expenses.

Solicitor for the Sub-Sheriff: *The Sub-Sheriff in person.*
Solicitors for the Grand Jury: *F. P. Tydd & Son.*

J. P. B.

REG. (DUCKETT) *v.* CALVERT (1).

Q. B. Div. 1897. Nov. 8, 9.

Township Commissioners—Accounts—Audit—Local Government Board auditor—Surcharge—Payments which the auditor deems to be "contrary to law or unfounded"—Certiorari—*Local Government (Ireland) Act*, 1871 (34 & 35 *Vict. c.* 109), *s.* 12.

The Commissioners of Killarney Township thought fit to have, at one and the same time, two systems of lighting in their township, the one by gas, the other by electricity, under two different contracts, with two different persons, the gas contract being the earlier in date. It may be here assumed that the gas contract was invalid, as being for over £50, and not duly sealed as required by the Public Health Act. Both contracts had, however, been recognised as valid by decrees of the County Court for work done and services rendered thereunder. It may also be assumed that one lighting contract would have been amply sufficient for the needs of the township, and that the existence of two concurrent contracts was owing to a want of unanimity among the Commissioners. Certain of the Commissioners (the present applicants) had signed (*a*) a cheque for £41 17*s.* 6*d.*, the amount of an unappealed civil bill decree obtained, for work under this contract, by the Electric Light Company, and costs, and (*b*) two cheques for £17 10*s.* 6*d.*, and £25 14*s.* 3*d.*, to the same Company, the one prior, the other subsequent to said decree. The auditor, when auditing the township accounts, surcharged these payments against the present applicants on the ground that they were unfounded and illegal, inasmuch as the Commissioners had no right to enter into a second contract for the very same thing, for the doing of which they had already entered into a valid contract. On *certiorari*,

Held, that the surcharges must be quashed—(*a*) the first surcharge, on the ground that it was in respect of payment of a debt which a competent Court had conclusively established to be due—and (*b*) the other surcharges, either on the ground (*per* O'Brien and Johnson, JJ.) that they were in respect of payments under a contract the validity of which was recognised by such decree, or on the ground (*per* Palles, C.B.) that, as there was no evidence to sustain the expressed reason of the auditor's surcharge (viz. the existence of a prior valid contract), the surcharge could not be supported.

CERTIORARI. Argument upon an order to show cause, dated the 4th June, 1897. On the 15th April, 1896, the prosecutors

(1) Before PALLES, C.B., and O'BRIEN and JOHNSON, JJ.

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(Duckett, Hurley, O'Sullivan, and Kelly, Commissioners of Killarney Township) having served the required statutory notices of the intended application, and entered into the necessary recognizances, 34 & 35 Vict. c. 109, s. 12, obtained, *ex parte*, from the Court, an order, absolute in the first instance, for a writ of *certiorari*, directed to the defendant J. H. Calvert, Auditor under the Local Government Ireland Acts, 1871 and 1872, to remove into the Queen's Bench Division for the purpose of being quashed "all and singular orders and disallowances or disallowances and surcharges made by him in his audit of the accounts of the Town Commissioners of the town of Killarney, acting in the execution of the Towns Improvement (Ireland) Act, 1854, whereby he surcharged against" the prosecutors "the sum of £85 2*s.* 3*d.* paid to the Killarney Electric Light Company, together with the reasons for such disallowances and surcharges, and all" documents, &c., "touching the same."

The writ issued on the 27th April, 1896, and Mr. Calvert, in obedience thereto, made his return, dated the 29th June, 1896.

The first schedule to the return showed the entries in the Commissioners' books of account relating to this sum of £85 2*s.* 3*d.* charged against the funds of the township. These entries were, (*a*), 31st August, 1894; draft for £17 10*s.* 6*d.*; payees, the Killarney Electric Light Co.; service, public lighting; (*b*), 5th March, 1895; draft for £36 19*s.* 6*d.*; payee, C. E. Leahy; service, public lighting; (*c*), 5th March, 1895, draft for £4 18*s.*; same payee; service, costs of decree; (*d*), 1st April, 1895; draft for £25 14*s.* 3*d.*; payees, the Killarney Electric Light Co.; service, public lighting. [(*b*) and (*c*) were paid in one cheque (£41 17*s.* 6*d.*) to Mr. Leahy, who was the Company's solicitor.]

In schedule 2 was set out the auditor's "statement," made pursuant to section 12 of the Local Government (Ireland) Act, 1871, in the following terms:—

I find the Killarney Electric Light Company, Limited, have been paid £85 2*s.* 3*d.*, included in this account, for lighting the town of Killarney. I consider the Town Commissioners were not justified in contracting with the Company to light the town, as they had previously entered into a contract with Mr. Santry to do the same thing, light the town of Killarney, using gas as the illuminant. Under these circumstances, I decline to pass these several pay-

ments, amounting to £85 2*s.* 3*d.* I declare this to be an illegal charge on the rates, and I surcharge Messrs. John Duckett, Daniel O'Sullivan, and John Kelly, with the sum of £17 10*s.* 6*d.*, sterling, amount of Draft No. 91, dated 31st August, 1894, which they, by their signatures as such Commissioners, authorised to be paid to the Killarney Electric Light Company, Limited; Messrs. John Duckett, David Hurley, and Daniel O'Sullivan, with the sum of £41 17*s.* 6*d.*, amount of Draft No. 20, dated 5th March, 1895, which they also by their signatures authorised to be paid to Charles E. Leahy; and Messrs. John Duckett, David Hurley, and Daniel O'Sullivan, with the sum of £25 14*s.* 3*d.*, amount of a further draft, No. 29, dated April 1st, 1895, which they also by their signatures authorised to be paid to the Killarney Electric Light Company, Limited; and I hereby direct these several persons to forthwith lodge the aforesaid sums which I have surcharged them with, to credit of the account of the Killarney Town Commissioners with the treasurer, the Munster and Leinster Bank, Killarney,

JOHN H. CALVERT, *Auditor.*

27th November, 1895.

The third schedule set out the "Notices of the Intended Application," dated 12th December, 1895, containing "a statement of the matter complained of" which had been served on the auditor. These stated the items of surcharge, to which objection was made "on the ground that such sums were paid by the Killarney Town Commissioners as sanitary authority in respect of a contract legally entered into by those Commissioners and in discharge of a decree of the County Court Judge of Kerry made against the said Town Commissioners at suit of the Killarney Electric Light Company, Limited."

The 4th schedule made an exhibit of the minutes of the Township Commissioners dealing with the matters out of which the surcharges arose.

The minutes of the Town Commissioners, so annexed to the auditor's return to the writ, may for the purposes of this report be thus summarised. There were, in the year 1893, two parties each desirous of illuminating the town of Killarney—a Mr. M. Santry, lessee of gas works, and the Killarney Electric Light Company, Limited. Their rivalry split up the body of the Commissioners into two equally divided opposing camps, and from time to time as the one or other faction found themselves in a majority, so the interests of gas or electricity declined or kicked the beam.

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Tenders for lighting having been invited for the ensuing three years, these came on for consideration at a meeting of the Town Commissioners held on the 15th September, 1893. A tender had been put in by Santry for gas; and four, at various figures, by the Electric Light Company. The Commissioners having heard what was offered by the rivals' solicitors, Leonard (the chairman) moved, and O'Connor seconded, that Santry's tender be accepted; Duckett moved that the Electric Light Company's tender be accepted, but was not seconded; then Hurley moved and Brosnan seconded that the question be adjourned to the January meeting; this was put and lost on a division by four to three. The next entry on the minutes was—"Mr. Santry's tender was then accepted without a division; Ordered, That the law agent be instructed to forthwith draw up the necessary bond and contract between the Commissioners and Mr. Santry."

It was in controversy, on the affidavits, whether this was intended to convey, or not, that the original resolution had been put at all, and whether it had been in fact put to the meeting. Duckett, in one of the affidavits on which the order for the writ was grounded, stated "he did not hear the original resolution put." Mr. Calvert (in his affidavit, which was, by permission, allowed to be read as part of the return) stated that it was sworn to before him by the clerk that the original motion had been in fact formally put and carried without a division.

Protests were subsequently lodged, and on the 24th Nov., 1893, at a special meeting summoned to consider a resolution on notice to rescind the contract with Santry, the electric light party attended with unexpected punctuality, and (Duckett being moved to the chair) a resolution was carried by four to one, Kelly moving and Hurley seconding, that the resolution of the 15th Sept. by which Santry's tender had been accepted should be rescinded. The Chairman (Leonard) and other Commissioners then came in; and the chairman (a gasophile) having taken the chair, "the contract with Mr. Santry as prepared by the law agent was produced and signed by the chairman and clerk, and sealed with the seal of the township." The deed was expressed to be made by the Commissioners as urban sanitary authority. A motion was then carried by a majority of one, that counsel should be consulted as

to the legality of the resolution of rescission, and as to the legality of affixing the seal of the Commissioners thereto without taking a vote thereon. On the 4th December, Kelly moved, and Hurley seconded, that the clerk be instructed to advertise for tenders for lighting. Leonard moved, and Huggard seconded, as an amendment, "that no tenders be invited as Mr. Santry is carrying out the existing contract"; and this amendment was carried by five to four. The original motion was then put, and was declared lost on the chairman's casting vote. At the next meeting (8th December, 1893) counsel's opinion was read to the effect that the rescission was legal; that the chairman's action in subsequently sealing the contract was illegal; and that the Commissioners had no power to contract with Mr. Santry as he was not a person supplying gas under statutory powers within the Public Health Act, 1878, 41 & 42 Vict. c. 52, s. 80. Meanwhile the partisans of electricity had obtained a conditional order from this Court at the suit of C. E. Leahy, solicitor for the Electric Light Company, to remove and quash the resolution accepting Santry's tender and the contract with him. This came before the Commissioners for consideration on the 4th December, when, by the chairman's casting vote, a resolution was carried to retain Mr. Downing, of Tralee, to defend the Commissioners. This resolution was subsequently rescinded, and eventually Santry undertook to show cause against the conditional order, which was ultimately discharged, the Court declining to interfere in the matter. On the 16th February, 1894, special resolutions were moved, on notice, to the effect that the tenders for lighting be reconsidered, and that the Electric Light Company's tender, with certain variations, be accepted. The chairman (Leonard), having refused to put this, was apparently moved from the chair, and it would seem that the resolution was then carried. On the 23rd, the Company having meanwhile assented to the variations, the contract with the Company was signed and sealed by Kelly, Hurley, and Duckett, as the Commissioners of the Township, and urban sanitary authority, and by the Clerk. On the 24th April, a resolution was passed, carried by the supporters of electricity, requesting Santry to send in his account and cease lighting the town, and a cheque for the amount due to that date was paid or offered. Santry, however, and also the Electric

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Light Company both still continued their services. On the 25th August, a resolution was carried by five to four, that the Electric Light Company's bill be paid, an amendment having first been put and lost "that neither of the bills now submitted be paid until it is decided by law which of the parties is the proper contractor." The chairman, however, refused to sign the cheque. On the 31st August, 1894, the partisans of the Electric Light Company being again in the ascendant, and having presumably a commissioner of their way of thinking in the chair, ordered the payment of the bill, £17 10*s.* 6*d.*, for which sum a cheque was then drawn. On the 7th September the gasophiles, apparently finding no opponents present, ordered a cheque to be passed to Santry for his account to the 30th June. On the 3rd December a resolution was passed, by a temporary coalition of some members of both factions, that no cheque be passed to either Santry or the Company until it had been decided in a Court of law which of them was "the proper contractor." Thereupon the Electric Light Company issued two civil bills for £17 10*s.* 6*d.*, and £19 9*s.* These were defended, but, the County Court Judge having granted decrees with costs, it was resolved (by a majority of one) not to appeal therefrom. On the 2nd March, 1895, it was ordered that a cheque should be issued for the amount of the decrees (£36 19*s.* 6*d.*, and costs £4 18*s.*) which was done. On the 1st April a resolution was passed that the Electric Light Company be requested to continue the lighting of the town at the same rate as theretofore until the matter of the lighting is definitely settled or until notice given. On the 1st April, 1895, a further cheque for £25 14*s.* 3*d.* for lighting was paid to the Electric Light Company. Soon afterwards Santry issued a civil bill for the amount of his gas account, £46 5*s.* to the 31st December, 1894; and, on the 5th April, 1895, the County Court Judge gave a decree for this amount also, with costs. The gasophiles, by a majority of one, carried a resolution not to appeal, and "to discontinue the use of the electric light," and that the Electric Light Company be communicated with accordingly. The gas bill and the costs were subsequently paid.

In this state of things the auditor thought it his duty to intervene when auditing the township accounts for 1895, and to

surcharge the applicants with the payments made by them as Commissioners, in respect of the electric light contract.

The affidavits of the applicants, on which the order for the writ was obtained, set out the substance of the matters stated above; submitted that the original resolution of the 15th September, 1893, was not put to the meeting, and in any event had been legally rescinded; submitted that the Commissioners, as the urban sanitary authority, could not enter into a contract for lighting with Santry under the provisions of the Public Health Act, 1878, seeing that Santry did not come within the description of persons (in section 80 of that Act) with whom the Commissioners could contract for the supply of gas or other means of lighting. All the applicants stated that their action had been *bona fide* throughout, and that they had only sought to secure what they believed to be the best, or most efficient and cheapest, lighting contract for the township, uninfluenced by any indirect or improper motive.

The auditor, in an affidavit (which was allowed to be read as part of the Return), stated that it was deposed to before him that the original resolution of the 15th September had been duly put to the meeting; that notice had been duly given to Santry of the acceptance by the Commissioners of his tender, and that Santry, in pursuance of his contract, had lit the town with gas during the very same period as that for which the Electric Light Company were paid. He pointed out that Santry had obtained a decree in April, 1895, on foot of his contract, and stated that, under these circumstances, he had come to the conclusion that it was an unfounded, wrongful, and illegal act on the part of the Commissioners, or of that section which was responsible in the matter, without any just cause whatever (for none such was proved before him) to enter into the arrangement referred to with the Electric Light Company for doing the very same thing, namely, lighting the town, which, as he concluded on the evidence before him, they had previously contracted with M. J. Santry that he should do during the same period, Santry having actually recovered a decree against the Commissioners in respect of his contract. He added that no reason was given for thus imposing on the ratepayers a double cost for effecting the same purpose, and that he

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therefore considered that the sums payable to the Electric Light Company were not properly chargeable against the rates.

On the 4th June, 1897, *Morphy*, for the prosecutors, obtained, *ex parte*, from the Court an order that the disallowances, &c., the subject-matter of the Writ and Return, "be entered for argument upon an order to show cause why the orders and disallowances or disallowances and surcharges in the premises should not be quashed, and that ten days be given to the auditor and to the other persons . . . directed to be served with this order to show cause why," &c.

No cause was in fact shown, but, by consent of the parties, the matter was now listed for argument.

R. E. Meredith, *Q.C.*, and *Morphy*, for the applicants:—

The payments which the auditor has here surcharged are neither "illegal" nor "unfounded" within s. 12 of the Local Government (Ireland) Act, 1871. They are payments made on foot of a valid contract made between the Commissioners as sanitary authority of the township and the Electric Light Company, acted upon by the parties, and recognised by a competent Court. One of the payments was made under a decree of the County Court, by which the validity of the contract was expressly established, under which execution might have issued if the debt remained unsatisfied. As to the others, the fact of this decree having been obtained should be conclusive evidence, behind which it was not open to the auditor to go, that the contract was a valid one. The prior gas contract was invalid, not having been duly sealed, the sealing having, under the circumstances, been an utter nullity. But, even if it may be suggested that it was inexpedient or imprudent, or even oppressive, that there should have been two concurrent contracts for the lighting of this township, that circumstance could not be a justification to the auditor. His duty and authority are confined and limited, by the words of the section, to what he deems to be "contrary to law or unfounded," and this, at most, can only be said to have been a thing he deemed imprudent or inexpedient: *Reg.* (*Inglis*) v. *Drury* (1). It cannot be

(1) Noted *infra*, p. 527.

held that these payments were illegal as being a misapplication of trust funds, seeing that the payments were made, directly or indirectly, under compulsion of law, and the auditor therefore, we submit, acted in excess of jurisdiction in attempting, as he has in effect here done, to review the decision of the County Court Judge: *Young* v. *Mayor of Leamington Spa* (1).

Matthew J. Bourke, Q.C., and *Cullinan*, for the auditor:—

These payments were illegal or unfounded, that is to say, unjustifiable, and an abuse by the Commissioners of their position as members of this public body: *Reg.* (*Jackson*) v. *Newell* (2); *The Attorney-General* v. *Barrett* (3); *The Attorney-General* v. *Belfast Corporation* (4). The persons who obtained this second contract were active supporters of the Electric Light Company, and this contract was a breach of trust on their part: *The Attorney-General* v. *Compton* (5). These cases show that persons availing themselves of their position as members of a public body cannot shelter themselves behind a resolution of that body to cloak impropriety and illegality on their part. The contractor may have his personal remedy against the individuals personally by whom the contract was carried, but can have none against the body. The existence of a decree of the County Court Judge in the case of the Electric Light Company might afford an argument if there were not also decrees affirming the validity of the prior gas contract. If the decision of the County Court Judge is relied upon in the one case, it must equally establish the validity of the other contract, under which also work was done, money paid, and decrees obtained. There was no decision whether the two contracts could not stand together. This is a discretionary writ, and the Court should not, under the circumstances disclosed, interfere with what the auditor has done. If it is not open to an auditor to correct an open abuse of power, such as we allege this to have been, the usefulness of his occupation is gone.

Cur. adv. vult.

(1) 8 App. Cas. 517.
(2) Noted *infra*, p. 530.
(3) Ir. R. 3 Eq. 392.
(4) 4 Ir. Ch. R. 119.
(5) 1 Y. & C. C. C. 417.

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PALLES, C. B. :—

The disallowances in question are substantially two :—1, the amount of a civil-bill decree pronounced by his Honour Judge Shaw against the Town Commissioners of Killarney, the corporate body whose accounts are under audit, at the suit of the Killarney Electric Lighting Company ; 2, certain sums paid to the same Company for lighting the streets of Killarney, but for which sums decrees were not obtained from the County Court Judge.

As to the first payment, all the members of the Court agree, not only in the decision, but in the grounds of it. We are all of opinion that the auditor had no jurisdiction to disallow it. The decree was made by a Court of competent jurisdiction ; it is not alleged that it was procured by fraud or collusion ; and we are therefore of opinion that it conclusively establishes the existence of the debt for the recovery of which judgment is thereby pronounced. Payment of such a debt is a legal payment ; and the auditor had no jurisdiction to go behind the decree, and himself determine whether the amount thereby recovered was or was not legally due.

In resting my judgment as to this item upon this ground, I am not to be taken as deciding that, if Town Commissioners enter into a contract of such a nature as to be, as between them and the inhabitants of the township, a breach of trust, they cannot be made responsible, in a proper proceeding, for the loss thereby sustained by the township ; but I think that a liability of that description must be established in a substantive proceeding, such as *The Attorney-General* v. *Barrett* (1). In many cases an act may be done by the governing body of a corporation which, as between a person who acts upon it and the corporation, may bind the latter, but which as between the governing body and their constituents, such as the ratepayers, is a wrongful act, or one against which the governing body are bound to indemnify the ratepayers. But—as the jurisdiction of the auditor is to determine whether the payment, if in fact made, is legal—if the circumstances are such that the action of the governing body constitutes the relation of debtor and creditor between the corporation and a third party, so

(1) Ir. R. 3 Eq. 392.

that a debt becomes legally due by the corporation to such third party, the payment of that debt must be deemed to be a legal payment, although the ratepayers may, in respect of it, be entitled to relief against some members of the governing body; and consequently the payment of such sum must be allowed by the auditor. Then the decree of the competent Court conclusively established that a debt had been created, and was due. The result necessarily follows that the amount must be allowed. Observe what would happen were this not so. Some members of a corporation might enter into an extravagant or a useless contract, but in such a mode as to bind the corporate body. A judgment or decree might be pronounced by a competent Court for payment of the amount, under which the chattels of the corporation would be liable to be seized and sold. To avoid this result other members of the governing body might rightly sign a cheque in favour of the creditor for the amount of the decree. These members may not have been parties to the entering into the contract; nay, they may have strongly resisted it; and yet, if the payment is to be at all disallowed, it must, under the Act, be surcharged, not against the persons who caused the contract to be made, but against the innocent parties, who properly paid the amount to prevent the sale of the goods of the corporation.

As to the second class of items, viz. the payment to the Electric Light Company of amounts for which decrees were not obtained, the auditor's reason for their disallowance is in these words: "I consider the Town Commissioners were not justified in contracting with the Company to light the town, as they had previously entered into a contract with Mr. Santry to do the same thing (light the town of Killarney), using gas as an illuminant." Thus, the disallowance is based by the auditor upon a matter of fact. His decision is a judicial one, and the only mode provided by the statute for impeaching it is by *certiorari*. Nothing appears in the section which prevents the application of the ordinary rules applicable to the impeachment by that writ of other judicial decisions; and, applying what I conceive to be those ordinary principles, I hold that if there be no evidence to sustain the conclusion of fact upon which the disallowance is grounded, that disallowance cannot be sustained. Thus the question comes to this:

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was there evidence before the auditor of such a previous contract? I am of opinion that there was not. No doubt on the 15th September, 1893, a resolution was passed purporting to accept Mr. Santry's tender for lighting the town with gas, and there was evidence before the auditor that notice of that acceptance was sent to the Gas Company. The subject-matter of the contract, however, being of a value exceeding £50, the Commissioners could not contract in relation to it, save under seal. The resolution accepting the tender does not purport to be an absolute contract, but rightly proceeds to instruct the law agent to draw up the necessary contract. So far, therefore, there was no completed contract. Then a special meeting was held on the 24th November, 1893, on a requisition duly signed by the requisite number of Commissioners, to consider a notice of motion that the resolution accepting Santry's tender should be rescinded. The proceedings at this meeting are regular on the face of the minutes. The requisition and notice of motion were produced at the meeting and proved. The motion to rescind was moved and seconded, and was carried by the requisite majority, five Commissioners voting for it, whilst one only voted against it; and it is recorded in the minutes as having been carried accordingly. The resolution appears, on its face, to have been in all respects in accordance with the provisions of the Act of 1847; and no evidence was given before the auditor to show that any one of those provisions was not in fact complied with. It, however, appears by the minute book that four Commissioners attended afterwards, and that the contract with Santry was then produced, was signed by the chairman and clerk, and sealed with the seal of the township. The Commissioners had no power to seal this deed, after the resolution which was the only authority for it had been regularly rescinded. The seal attached to the contract was consequently not, in law, the seal of the Commissioners, and the alleged contract with Santry was absolutely void. The document, thus sealed, was the contract upon which the auditor disallowed the payments.

The only matter before the auditor which was relied upon as being evidence of the existence of this contract with Santry was a decree of the County Court Judge in a civil-bill action brought by Santry against the Town Commissioners for the price of gas

supplied. With great deference to my colleagues, from whom, I understand, I differ upon this question, I must say that it is unintelligible to me how this decree can, as against the present prosecutors, establish the validity of the contract with Santry. The cause of action is not upon a contract under seal, but is for goods sold, for a sum under £50, being the price of gas actually supplied to the Commissioners, under a document purporting to be duly sealed by the Commissioners, and if that document were *bona fide* believed by Santry to have been duly sealed, that sum could have been recovered by him against them, although the circumstances under which the seal was attached prevented the document being the contract of the corporation. But further, the decree was no more than a judgment *inter partes*, between Santry and the Commissioners in their corporate capacity. Any effect which it can have, either by way of estoppel, or as evidence, can be as between those parties only. The present motion is not a proceeding between those parties. Mr. Santry is not a party here ; nor are the Commissioners, in their corporate capacity. The audit was a proceeding between such of the Commissioners as had made unauthorised payments—between them personally and individually—upon the one hand, and the ratepayers upon the other hand; and in such a proceeding the decree is neither an estoppel, nor even evidence.

For these reasons, I am of opinion that there was no evidence to sustain the conclusion of the auditor as to the matter of fact which was essential to his disallowance, and that such disallowance must be quashed.

O'BRIEN, J. :—

I concur in its general result with the judgment of the Lord Chief Baron, but not for the same reasons as regards all the items in dispute. It seems to me absolutely certain that, in the exercise of his powers, the auditor had no authority to question any of these payments. They were made in pursuance of decrees of the Civil Bill Court; they were made under legal compulsion; if the amounts had not been paid, the result must have been that execution would have been levied upon the goods of these Commissioners; and no person can be allowed to say or to hold

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that payment made to avoid an execution under a judgment or decree is "contrary to law or unfounded." As to the second clause, dealing with payments that are "unfounded," no question can arise in respect of payments made under these two decrees; for not only do the facts show that these payments were not contrary to law, but they show that these were necessarily made under the decree of a competent Court to prevent execution; and so far as regards the conduct of the auditor, no question can arise at all on the other branch of the question, whether this could be a payment "unfounded" in point of law. The reason adduced by the Lord Chief Baron affords a complete answer. This is a fluctuating body, composed of members that come and go, and it might be that persons, subsequently becoming members of the body, and quite innocent of misconduct, might be held liable, if they made a payment, to be surcharged in such amount, even though that payment was made to relieve the property of the Commissioners for whom they were acting.

The only matter upon which, as it appears to me, any dissent arises is in reference to the item of £17 10*s.* 6*d.* That sum was paid before either of the decrees had been pronounced. But that payment was made in relation to the same contract which subsequently was affirmed and declared valid by the County Court Judge after the fullest opportunity had been given to all parties—for the parties representing both these rival claims to the lighting of the town were before the Court—to argue upon the legality of the demand. The County Court Judge decided that the contract was a legal one. Not only therefore are the prosecutors here exempt as acting under the compulsion of law, but the case, as it appears to me, seems to go still farther. It is wholly unnecessary for me to enter upon the question whether the Gas Company's contract was a legal one or not. The Chief Baron has incidentally dealt with it because the auditor gave as a reason of the disallowance the existence of the prior contract, a question of fact, not of law. In my opinion, this question is entirely removed from the consideration of the auditor and of this Court by the decision of the County Court, and I recognise the grave danger that might arise from throwing doubts upon the force of the judgments and decrees of the Courts of the country. But apart from this, it will

be observed that every subsequent payment, not only those to which the civil bill decrees referred, but those accruing subsequently, were made by the same body, under the same contract; and it seems to me that this was an affirmation by their acts that the contract was legal and binding upon them. It appears to me as impossible to disregard the acts of the parties as to overturn the effect of the decision of the Court of Law. The body have acted upon this contract; they have made payments under it, and, in my opinion, no question as to its legality can arise at all.

At first I entertained some doubt as to what the meaning of the word "unfounded" might be in the section of the Act of 1871. It was under discussion in a former case in this Court. It may be that it would be too narrow a construction to confine it to what is unfounded in fact, as opposed to what is unfounded in law; and I, certainly, am not inclined in the least degree to derogate from the authority of the auditor in cases of this kind, or to narrow his authority so that he could not, under this head of "unfounded," have the power to deal with all payments of an unnecessary or extravagant kind. He has to act upon the documents before him, he has no authority to go into disputed matters of fact; his authority to receive evidence is limited to the verification of such documents; and I should be disposed to extend in every way his authority to the fullest extent necessary for the ends of justice. However, I cannot think that in the exercise of any discretion vested in him by the law he was justified in setting aside and disallowing the payment of this item of £17 10*s.* 6*d.* It was made indeed before the decree of the County Court, but it was made under a contract that was affirmed by that decree, and recognised and carried out by payments subsequent to that decree. On this ground alone I hold that the surcharges should be disallowed.

JOHNSON, J.:—

The Local Government Act (Ireland), 1871, section 12, provides that this Court "shall decide the particular matter of complaint set forth in the statement"—by the prosecutors in the present proceeding in their notice to the auditor—"and no other."

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By their notice the now prosecutors object to the auditor's surcharge of the four sums in question, on the grounds that "said sums were paid by the Killarney Town Commissioners, as sanitary authority, in respect of a contract legally entered into by said Commissioners in discharge of a decree of the County Court Judge of Kerry made against said Commissioners at suit of the Killarney Electric Light Company, Limited." This notice is not strictly accurate because it is only the second and third sums surcharged which were paid under the decree therein referred to; but in substance it covers the four surcharges.

On examining the accounts of the Killarney Township, the auditor found that, at one and the same time, the Town Commissioners had two systems of lighting in operation in the township, one by gas and the other by electric light, under two different contracts, with two different persons, each of whom had recovered judgment against the Commissioners on foot of his contract for the respective light supplied. He considered on the evidence before him that one system of lighting was sufficient for the township, and he deemed it to be an unfounded abuse by the Commissioners of their powers, at the cost of the ratepayers, to have the township doubly lighted without necessity. He decided that the gas contract was first entered into by the Commissioners for a period covering the time for which the electric light contract was subsequently entered into by them, and that the gas contract was established by the judgment of the County Court to be a valid contract. He therefore allowed the payments by the Commissioners on foot of the gas contract, and disallowed the payments by them on foot of the electric light contract, and surcharged these payments on the now prosecutors, being the individual Commissioners by whom the cheques for payment were signed.

But a judgment of the County Court, which was also before the auditor, established the liability of the Commissioners on foot of the electric light contract, and was in full force and effect when the payments, Nos. 2 and 3, for debt and costs under that contract, (which are surcharged) were made. If the amount of that judgment had not been paid, it would have been levied off the goods of the Commissioners. The payment therefore of these two sums (Nos. 2 and 3) was not "contrary to law," but was according to

law; and, being according to law, it was not within the competence of the auditor to deem them "to be unfounded." His decision therefore as to these two sums is, I think, erroneous. The legality of the electric light contract being thus established by the unimpeached judgment of a Court of competent jurisdiction, it follows, in my opinion, that the auditor's surcharges of the first and fourth sums (Nos. 1 and 4, £17 10*s.* 6*d.*, and £25 14*s.* 3*d.*), paid by the Commissioners for the light supplied under the electric light contract, were also erroneous.

On the present motion I give no opinion upon the gas contract, or in reference to the auditor's decision respecting it; nor, in the view which I take of this case, is it necessary for me further to define the meaning of the words "or which he deems to be unfounded." I therefore forbear to do so, and confine myself, as provided by the Act, entirely to a decision of the particular matter of complaint set forth in the notice by the now prosecutors to the auditor, of the present application.

Solicitors for the relator: *Huggard & Willington.*
Solicitors for the auditor: *J. & A. Blake.*

A. E. R. J.

REG. (INGLIS AND OTHERS) *v.* DRURY.

Q. B. D.—June 4, 1896.

Before O'BRIEN, JOHNSON, HOLMES, and GIBSON, JJ.

THIS was an application, on the part of certain members of the Dublin Port and Docks Board, for a writ of *certiorari* to quash a surcharge made by the respondent, a Local Government Board auditor, when auditing the accounts of that body. Mr. Drury had surcharged against the applicants a sum of £726 9*s.* 2*d.*, portion of the amount paid by them, as representing the Board, for the purpose of discharging current interest due (at four per cent. per annum), on "the Ballast Office Debentures." This £726 9*s.* 2*d.* represented one per cent. of the interest so payable. The reason stated for the disallowance was in effect that having regard to the state of the money market and to the fact that the Board had been lately able to borrow money at three per cent . . . they were bound, as trustees of the port, to administer their trust with all possible

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economy, and were not justified in continuing to pay an unduly high rate of interest on these debentures.

S. Ronan, Q.C., J. H. Campbell, Q.C., and *G. Walker*, for the applicants. *Dunbar Barton, Q.C., R. E. Meredith, Q.C.*, and *G. Y. Dixon*, for the respondent.

O'BRIEN, J.:—The decision at which I have arrived, like my colleagues, has been determined by the mere ground of law. Of course it was quite impossible to have had the legal question discussed here without the question of vindication of personal opinion being also involved; and for that reason Mr. Ronan, on the one hand, has been allowed to go into the matters stated in the affidavits, in order to show that there are *bona fide* grounds for the course adopted by the Port and Docks Board, and the same kind of liberty has been conceded to Mr. Drury, to show the reasons for the conclusions that he arrived at; but it appears to me not necessary at all to determine that matter now. We think the very doubt suggested at the Bar, and the contradictory opinions referred to, in the result of which Mr. Meredith has met with some degree of casual disappointment, seem to displace very clearly the complaint against the Port and Docks Board, that they did not take upon themselves to launch into a sea of legal and financial difficulties, the ultimate prudence and the result of which may be very doubtful. The Act of Parliament, which constitutes the authority of the Auditor, requires him to state, as a legal tribunal is called upon to state, subject to all the questions that may be made upon it, the ground of his conclusions, and he has stated it; but, as Mr. Justice Holmes has observed, he has not stated directly that the Port and Docks Board were guilty of a breach of trust, and that that was the form of illegality which made him come to the conclusion he did. He has stated in a general way at first, that he considered the charge contrary to law and unfounded, and then he has put the interpretation upon what he means by unfounded and unlawful, by the succeeding paragraph in which he states, not a breach of trust as the form of illegality, but an act of imprudence on the part of the Port and Docks Board, which is not the same thing at all. The power given by the concluding part of the 12th section of the Act of 1871 to the Chief Secretary upon appeal is the same power as is to be exercised by the Court of Queen's Bench upon *certiorari*, namely, to determine whether or not the reasons given are such reasons as will sustain the *certiorari*; and we must determine, therefore, upon the legality of the ground he has alleged. Now I have rather come to the conclusion that the view suggested of the construction of this clause by Mr. Meredith is not the right one. He may disallow all charges that are "contrary to law or unfounded," and may surcharge all persons who have made payments of them with the amount of illegal payments. If Mr. Meredith's view be right, the power to surcharge is confined to what is illegal, and therefore there would be no power of surcharge at all in regard to a matter that was merely unfounded, if unfounded is distinguishable from what is illegal. How he can

escape that difficulty I cannot see in any way whatever. The plain and obvious construction is that "contrary to law or unfounded" means the same thing as unfounded in point of law or unfounded in point of fact. And to put the interpretation on the word "unfounded" that it may mean a breach of trust, arising from an imprudence in not exchanging a security at four per cent. for a security at three per cent., is an entirely new construction to put on the English language. The question of propriety or prudence in this matter I do not think it is at all necessary to consider, and it is extremely doubtful what result we might arrive at. Whether the Auditor is right in his view or the Port and Docks Board, it is quite plain that they have suggested sufficient reasons for their view; and, although I would be very slow to come to the conclusion that the power given to them under the 236th section—the discretion given to them—would cover a case of gross malversation or improper or gross or wilful breach of trust, it is quite certain that the section applies to the facts as they exist in the present case, and therefore the *certiorari* must issue. There is no suggestion of any abuse or malversation in any form, but merely a difference of opinion. For these reasons it appears to me—I do not know whether I express the views of my colleagues or not—that the auditor acted entirely in excess of the authority given to him by law in the course he adopted, and therefore, the order for the *certiorari* ought to be made absolute—the applicants' costs to be paid out of the funds of the Board on which these debentures are charged.

HOLMES, J.:—Although I think it is sufficiently clear by my brother O'Brien's judgment, yet, at the same time, it cannot be made too clear that the Auditor of the Local Government Board has a very important duty to perform in preventing breaches of trust and misconduct by public officers, and that there is nothing whatever in our judgment that prevents him surcharging any of the bodies with whose accounts he deals if it can be shown that they have been guilty of a breach of trust or illegal conduct.

JOHNSON and GIBSON, JJ., concurred.

The conditional order for a writ of *certiorari* was made absolute, and costs to Auditor refused. A. E. R. J.

Solicitors: *D. & T. Fitz Gerald; Norris Goddard.*

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REG. (JACKSON) *v.* NEWELL.

Q. B. D.—1896: October, 29; Nov. 2.

Before SIR P. O'BRIEN, L.C.J., JOHNSON, HOLMES, and MADDEN, JJ.

THIS was a similar application in reference to a surcharge by the respondent Mr. J. Newell, Local Government Board Auditor, made against Sir R. Jackson, and two other members of the Pembroke Township Commissioners, in respect of a payment by them of a sum of £150 to the Bank of Ireland as treasurer to the Commissioners.

J. H. Campbell, Q.C., *Meredith, Q.C.*, and *A. Blood*, for the applicants.

S. Ronan, Q.C., and *D. Henry, Q.C.*, for the respondent.

SIR P. O'BRIEN, L.C.J.:—Mr. Newell, one of the Local Government Board Auditors, has surcharged three of the Pembroke Township Commissioners with a sum of £150, paid by them to the Bank of Ireland as a salary for acting as treasurer of their body; and the question is whether that surcharge was rightly made. The Pembroke Township Act of 1863 incorporates, through section 59 of the Towns Improvement (Ireland) Act, 1854, the 65th section of the Commissioners Clauses Act of 1847. The Act of 1847 provides that the Commissioners may appoint a treasurer at such salary as they think reasonable, and the Act of 1854 enacts that they shall in all cases appoint some Bank or Banking Company as their treasurer. The Bank of Ireland was appointed treasurer about the time of the constitution of this Township, but at first received no salary. Subsequently a salary was granted to them under circumstances that go to the root of this case. Those circumstances are explicitly and candidly stated by Sir R. Jackson in his affidavit, and in the letters to which he refers. The object of the payment is there expressly shown to have been to meet the difficulty that had arisen in consequence of the Township's indebtedness to the Bank, and the legal impossibility of paying interest upon an overdraft. Nothing could be more candid or plainer than his statement, and from it alone it is quite obvious that the salary was not given in respect of any services as treasurer, nor measured in reference to the value of any such services; but that, on the contrary, the duties of the Bank were so meagre in character that, as my brother Madden has observed, £20 would have been a sufficient remuneration. In his letter of the 30th of January, 1894, offering to appoint the Bank treasurer, Sir R. Jackson states that the Commissioners anticipate that they may need to overdraw their account from time to time to the extent of about £2500, and he adds that, early next year, and prior to the striking of the rates, a larger overdraft might be required. That is to say, roughly speaking, this salary would represent interest upon £2500, or £3000, at 5 per cent. In reply to this letter, Mr. Barlow, of the Bank of Ireland, in a letter of the 2nd of February, states that the directors of the Bank accepted the offer, but that it was to be understood that the Bank was not to incur any new responsibibity. This was in effect to stereotype the old

relation of banker and customer under a new name. Whether the office of treasurer, from this date onward, was to involve the discharge of any duties other than those previously existing, I do not stop to enquire; but it would seem that the directors of the Bank, knowing the consideration for which the salary was given, insisted that no fresh responsibility should be cast upon them. In what light did this transaction present itself to the mind of Mr. Newell? The second reason given by him for the surcharge is that the transaction was not *bona fide*, but a colourable arrangement merely, with the object of allowing, under the name of salary, interest upon an overdraft, which the Commissioners had no legal power to pay. We are all of opinion that the affidavits and the correspondence clearly indicate the correctness of his conclusion in point of fact; and, this being so, the legal result is plain. Indeed, I find the law stated with perfect accuracy to the Commissioners by their own solicitors, Messrs. Fitzgerald, who advised them that they had full power to appoint the Bank of Ireland their treasurer, but that they had no power whatever to include under the head of salary anything in the nature of interest upon an overdraft, and that, if they did so, the auditor would be bound to disallow the payment. This exactly represents what has been done. The Commissioners under the guise of giving a salary to the Bank as their treasurer, have been contriving to pay interest upon an overdraft at the Bank. This they have no authority, statutory or otherwise, to do. Their borrowing powers are apparently exhausted, and it is hardly necessary to refer to Lord Justice Lindley's book on Partnership for the familiar principle that what cannot be done directly cannot be done indirectly. In *Brooks & Co.* v. *Blackburn Benefit Society* (9 App. Cas. 857), Lord Watson says:—"I must confess my inability to understand the proposition that an advance made by a banker to a customer, whose account is overdrawn, does not constitute a borrowing and lending in the strictest sense of the words. It is no doubt a particular mode of borrowing, and is frequently resorted to by business men, not for the purpose of obtaining a permanent loan, but temporary accommodation; still, it may be used so as to add to the capital, and so to increase the liabilities of the borrower." This clear language of Lord Watson puts the question beyond argument. We are, therefore, of opinion that the surcharge of this payment by the auditor was clearly warranted on the facts and on the law, and that the present motion for a writ of *certiorari* challenging his action must be discharged. We make no order as to the costs; the auditor will get his costs under the statute.

JOHNSON, HOLMES, and MADDEN, JJ., concurrred.

Solicitors for applicants: *D. & T. Fitzgerald.*
Solicitors for respondent: *Hayes & Sons.*

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Jan. 21, 22, 26, 27. Feb. 26.

HANNA *v.* POLLOCK (1).

(1897. No. 2956. Exch. Div.)

Artificial watercourse—Right to the flow of water—Presumption of lost grant between tenants of common landlord—Effect of merger through purchase of the fee by the tenant of the servient tenement—Purchase of Land (Ireland) Act, 1885 (48 & 49 *Vict. c.* 73), *ss.* 8, 9—*Land Law (Ireland) Act*, 1896 (59 & 60 *Vict. c.* 47), *s.* 34.

Prior to 1894 (when they purchased their holdings through the Court of the Irish Land Commission) H. and P. were tenants of adjoining farms on the same estate. In 1861 the predecessor of H., for the better drainage of his holding, constructed a drain through his lands to a neighbouring river, and at the same time a weir was constructed on the course of this drain, and a "carry" or conduit, by which some of the water was led in a different direction along H.'s side of the boundary between the two farms to the public road, and thence along that road (which ran through P.'s holding), supplying a tank on P.'s holding with water, and ultimately finding its way to the river at a point lower down its course.

In 1896 H. altered the drainage of his lands, and removed this "carry," so that it no longer supplied P.'s tank. P. entered on H.'s land and restored it. H. sued for damages. P. justified under an alleged parol agreement in 1861, and by prescription. At the trial the jury found a lost grant, but found that there was no flow of water as of right prior to the drainage operations in 1861, and the Judge directed a verdict for the defendant. On new trial motion:—

Held, *per* Andrews, Madden, and Boyd, JJ. (*diss.* Kenny, J.), that the drain through H.'s farm was merely an artificial drain, made for the improvement of his land, and was essentially not of a permanent character, but open to alteration, improvement, or removal by H. at his pleasure; that the enjoyment therefore by P. of a supply from such drain must be regarded, not as of right, but as permissive merely; and that H. was entitled to a verdict for nominal damages, and to judgment.

Per Kenny, J. (*diss.*), that, having regard to the evidence and to the course of the trial, the drain must be taken to be a permanent though artificial watercourse, and that therefore H. was not entitled to succeed on this ground; that twenty years' uninterrupted user having been proved, the jury were justified

(1) Before Andrews, Madden, Boyd, and Kenny, JJ.

in finding a lost grant; that the easement so established bound the tenancy of H. during its subsistence, and could not be defeated by its voluntary merger in the fee, consequent upon the purchase by him of his holding in 1894 through the Court of the Land Commission; and that accordingly the verdict and judgment ought to stand.

NEW TRIAL MOTION. Prior to 1894, when they purchased their holdings through the Court of the Irish Land Commission, Hanna and Pollock were tenants of the same landlord of adjoining farms, the boundary between the two being on the line marked Q–N–Weir–S on annexed map. In 1861 Hanna's predecessor in title (Hugh M'Curdy Hamilton) constructed a drain through his lands from "B" to "Weir," and thence to "S," where the drain emptied into a river, the Killagan Water. At the same time a "carry," or conduit, was constructed, apparently by Pollock, running from the point marked "Weir" to "N," along the boundary between the two holdings, but on Hanna's side of that boundary, thence along a public road through Pollock's holding, past his house (near which, at "P," it supplied a watertank), and ultimately finding its way into the Killagan Water, at a point further down stream.

In 1896 Hanna altered the drainage of his lands, and removed or so altered the "carry" or conduit from "Weir" to "N" that the water no longer flowed along it, or supplied Pollock's tank at "P." Pollock entered and restored the "carry." Hanna thereupon instituted the present action against James Pollock and his brother Nathaniel Pollock, claiming damages for trespass, and for obstruction of a watercourse (apparently from "Weir" to "S"), and for flooding his lands. The defendants Pollock justified, alleging an agreement in 1861 between Pollock and Hanna's predecessor to deepen the stream (*i.e.* from "B" to "Weir"), and divert a part to the Killagan Water, and to construct a "carry" (from "Weir" to "N" and "P"); relying further on user as of right uninterruptedly from 1861 onwards, and counterclaiming for damages.

At the trial before the Lord Chief Baron the following questions were left to the jury:—1. Did Hugh M'Curdy Hamilton, by deed, now lost by time and accident, grant to James Pollock, and his successors in title to the farm held under his lease, liberty

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to erect a "carry" at the place at which it stood, and to the height at which it was, before the commencement of this action? (*Answer*—Yes.) 2. Did said Hugh M'Curdy Hamilton, or other the lessee of the farms now the plaintiff's, grant to James Pollock and his successors in title to the farm held under his lease, that a portion of the water flowing at the point marked "Weir" on the plaintiff's map, should flow through the hole in the fence to the public road, and alongside such road to the defendant's tank opposite his house? (*Answer*—Yes.) 3. Before the drainage operations of 1861 did any water flow, as of right, from the place marked "Weir" on the plaintiff's map to the public road, and from thence to the defendants Pollocks' farm? (*Answer*—No.) Upon these findings the learned Judge directed a verdict for the defendants in the original action and on the counterclaim, with nominal damages on the counterclaim, and gave judgment for the defendants, with costs.

The plaintiff now moved to change the verdict and judgment, and to have judgment entered for him for a nominal sum, and for judgment on the counterclaim, notwithstanding the findings of the jury on the first and second questions submitted to them, on the ground that the plaintiff and the defendants, being owners in fee of their respective lands, and the origin of the presumed grant having been found by the jury in their answer to the third question, no question of lost grant should have been submitted to them, and on the ground that the alleged user was insufficient to establish a right under the Prescription Act, and that a lost grant could not, under the circumstances of the case, be inferred, or for a new trial upon the like grounds, and on the ground of misdirection, and on the ground that the first and second findings of the jury were against evidence and the weight of evidence.

Serjeant Dodd (*John Gordon, Q.C.*, and *R. F. Todd*, with him), for the plaintiff, argued that the drain was a temporary structure, built for the plaintiff's own convenience and the improvement of his land; and that the user by the defendant of portion of the water it conveyed could not cast on the plaintiff a burden to

maintain it for ever: *Arkwright* v. *Gell* (1); *Greatrex* v. *Hayward* (2); that, assuming the Court to be bound by the decisions in *Timmons* v. *Hewitt* (3) and *O'Kane* v. *O'Kane* (4) to hold that a lost grant may be presumed between tenants of a common landlord, still such lost grant could only be a grant to bind the limited estates of the parties thereto; that the 9th section of the Purchase of Land (Ireland) Act, 1885—now repealed by the Land Law (Ireland) Act, 1896 (see sects. 34, 50, and 52), but operative when the vesting orders in this case were made—left this matter open; and that the plaintiff was entitled to nominal damages.

O'Shaughnessy, *Q.C.*, and *J. H. Campbell*, *Q.C.* (*William Moore* with them), for the defendants, contended on the evidence that the drain was a permanent structure, and that therefore, though it was an artificial watercourse, the defendants were entitled to set up a prescriptive right, and to rely upon the presumption of a lost grant between the parties: *Rameshur Singh* v. *Koonj Pattuk* (5); *Wood* v. *Waud* (6); *Blackburne* v. *Somers* (7); that *Timmons* v. *Hewitt* (3) and *O'Kane* v. *O'Kane* (4) established beyond question that in Ireland a lost grant may be presumed where the fee is not bound; that the presumed grant in the present case still bound the land in the plaintiff's hands, though his tenancy had been merged in the fee on the purchase by him in 1894 of his holding through the Court of the Irish Land Commission, for otherwise the plaintiff would be derogating from his own grant: *Dynevor* v. *Tennant* (8); *Saint* v. *Pilley* (9). In any event (counsel urged) the provision of the Purchase of Land Act, 1885 (sect. 9, sub-sect. 2), that, in the absence of any declaration to the contrary, "the holding shall be deemed to be sold subject to such rights of common, rights of way, and other rights and easements as may lawfully affect the same" (*i. e.*, the holding, not the fee), was conclusive on this point in the defendants' favour.

Gordon, *Q.C.*, in reply.

(1) 5 M. & W. 203.
(2) 8 Exch. 293.
(3) 22 L. R. Ir. 627, 641.
(4) 30 L. R. Ir. 489.
(5) 4 App. Cas. 121.
(6) 3 Exch. 748.
(7) 5 L. R. Ir. 1.
(8) 13 App. Cas. 279.
(9) L. R. 10 Ex. 137.

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The following cases were also referred to during the argument:—

Wheaton v. *Maple & Co.* (1); *Mason* v. *Shrewsbury, &c., Railway Company* (2); *Fahey* v. *Dwyer* (3); *Tennent* v. *Neil* (4); *Hanks* v. *Cribbin* (5); *Beggan* v. *M'Donald* (6); *Clancy* v. *Byrne* (7); *Deeble* v. *Linehan* (8); *Doe* v. *Reed* (9); *Outram* v. *Maude* (10); *Bright* v. *Walker* (11); *Gayford* v. *Moffatt* (12); *Daniell* v. *Anderson* (13); *Re Keogh* (14).

Cur adv. vult.

Feb. 26.

KENNY, J.:—

In this case the Chief Baron left two questions of "lost grant" to the jury, both of which they found in favour of the defendants. The one was as to the "carry," the other as to the flow of water. The plaintiff says that the stream was artificial and temporary in its character, and contends that—although there was evidence to go to the jury, on which they might have found twenty years' user—no question of lost grant ought, under the circumstances, to have been left to them; and further, that, if the question was one proper to be submitted to them, their verdict is against the weight of evidence. These contentions are based on the finding of the jury in reply to the third question—namely, that no water flowed as of right from the place marked "weir," on the plaintiff's map, to the public road, before the drainage operations of 1861,—and on the evidence in the case, which was, in my judgment, most suggestive of the inference that the drain which has conveyed this water to the "carry" was originally constructed for a purpose that might well be regarded as temporary within the meaning of those authorities that distinguish between "permanent" and "temporary" watercourses. The question was one essentially of fact; and, had it been submitted to the jury, I doubt if any Court, having regard to the nature

(1) [1893] 3 Ch. 48.
(2) L. R. 6 Q. B. 578.
(3) 4 L. R. Ir. 271.
(4) Ir. R. 5 C. L. 418.
(5) 7 Ir. C. L. R. 489.
(6) 2 L. R. Ir. 560.
(7) Ir. R. 11 C. L. 355.
(8) 12 Ir. C. L. R. 1.
(9) 5 B. & Ald. 232.
(10) 17 Ch. D. 391.
(11) 1 C. M. & R. 211.
(12) L. R. 4 Ch. 133.
(13) 31 L. J. Ch. (N. S.) 610.
(14) [1896] 1 Ir. R. 285.

of the evidence, would have disturbed their finding, whether it was for the plaintiff or for the defendants. The question was not one for the Judge. It is impossible to conceive one that could be more essentially for the jury. If they found that the watercourse was a "temporary" one, the user of it could afford no presumption of a grant at common law, for, the enjoyment being precarious, could not be "as of right" or "uninterrupted." The essential matter, however, is this, that from beginning to end of the trial, no such question appears to have been suggested; and I cannot but assume that the watercourse was dealt with as a permanent though artificial one. Had the point been made, I entertain no doubt that the Chief Baron would have taken the sense of the jury upon it as a preliminary one to the question of lost grant, which the plaintiff is right in contending could not have been left to them if the watercourse was but "temporary" in its character. The mere fact of so experienced and painstaking a Judge as the Chief Baron putting the question of lost grant without any preliminary one, confirms me in the conclusion that there was no thought on the plaintiff's part of then making the case which is now so strongly relied on. But the plaintiff's counsel say that they would have been almost justified in asking for a direction on this question. I cannot accede to such a proposition. At the close of the case a direction was asked for in favour of the plaintiff, both on the claim and counterclaim, on one ground, and on one ground only—namely, that all questions of quasi-easement as between leseees were out of the case—the plaintiff and the defendants being owners in fee. How, then, having regard to the course of the trial below, can we say that there should have been a direction on this point, or a new trial. No doubt, if the judge was wrong in not directing a verdict, we are bound to give the judgment he should have given. But, if the Chief Baron had directed a verdict for the plaintiff on the ground that the watercourse was a temporary one, such a verdict could not, in my opinion, have stood; for he would have been assuming the functions of the jury by inferentially deciding a pure question of fact in respect of which there was, I consider, evidence to go to the jury of the permanence and character of the watercourse. James Pollock, who knew the

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stream for fifty or sixty years, deposed that in Sawney Hamilton's time—which was before 1861—he "fetched water down the stream"; that M'Curdy Hamilton (the predecessor in title of the plaintiff, who had made the existing cutting about 1861) and he agreed to send the whole of the water down "this road"; and that both plaintiff's and defendants' men scoured the drains. John Kerr, an old man, deposed that, before 1861, the water came straight down from White-gate past Pollock's; that the same hole in the fence was there then; that M'Curdy Hamilton said that "James Pollock was to be left his water"; that they put up the "carry" in order that Pollock might have the water "he was in the habit of getting"; and that the part of the stream that passed to Pollock's appeared to be an old course. Hugh Smyly and Thomas M'Kinnon deposed that, forty years ago, the water flowed from plaintiff's land by White-gate along the road by Pollock's house; and Nathaniel Pollock, aged 54, stated that the water-course passed his house since he was a boy, and that it came from White-gate.

Although this evidence does not satisfy me of the permanent character of the stream, I cannot say that it might not satisfy a jury. It is, I conceive, evidence that could not be withdrawn from them, or that could be treated as not bearing on the question of permanence.

In *Arkwright* v. *Gell* (1), which has been cited as the leading authority on this question, Lord Abinger, in delivering judgment, says that "the flow of the water through the channel was, from the very nature of the case, of a temporary character, having its continuance only while the convenience of the mine owners required it"; and he adds that "there was evidence that discontinuance was contemplated." I cannot say with certainty, on the evidence, that the water of this stream was not dedicated to the Pollocks, and perhaps to others; that its continuance was only while the convenience of M'Curdy Hamilton and his assignees required it; or that there is any evidence at all that its discontinuance was ever contemplated: see also *Blackburne* v. *Somers* (2); *Wood* v. *Waud* (3); *Greatrex* v. *Hayward* (4); *Rameshur Singh* v. *Koonj Pattuk* (5).

(1) 5 M. & W. 203. (2) 5 L. R. Ir. 1. (3) 3 Exch. 748.
(4) 8 Exch. 293. (5) 4 App. Cas. 121.

I therefore think that a verdict for the plaintiff could not be entered; and, having regard to the course of the trial, I am further of opinion that the action should not be sent to a new trial: *Martin* v. *Great Northern Railway Company* (1).

A more formidable contention on the finding of lost grant, was, however, that which relied on the circumstances under which the alleged easement came into existence, as showing that no grant was ever in fact made, and consequently that the jury should not have found as a fact that a grant had been made. The present drain seems to have been a substitute for a much older one, and was made about 1861; and, on the evidence of James Pollock and John Kerr, I should infer that, as a matter of fact, no deed granting the easement now claimed by the defendants was ever executed, and that the matter rested entirely in parol. The jury, however, have in effect found that there has been uninterrupted user for twenty years; for, without such a finding, they could not have answered in the affirmative the questions as to lost grant; and it is contended that their verdict in this respect is against evidence, and the weight of evidence, and that the twenty years' user is consistent with the fact of no grant having ever been executed. I presume that the Chief Baron directed the jury that, if they were satisfied as to the twenty years' user, they were at liberty to presume a grant unless there was something in the case to rebut the presumption. The plaintiff says that there is ample evidence in the circumstances under which the alleged right was created to rebut the presumption; but, having regard to the judgments of Lords Justices Thesiger and Cotton in *Angus* v. *Dalton* (2), the presumption arising from the user could not be rebutted by mere proof that no grant was in fact made either at the commencement or during the continuance of the enjoyment. At page 186 of the report of that case, Cotton, L.J., states the proposition in its most extreme form—"If therefore the parties at the trial *admitted* that there was not in fact any grant, this, in my opinion, was not sufficient to rebut the presumption arising from twenty years' enjoyment, or to justify a judgment for the defendant." No doubt, Cockburn, C.J., in the Court below (3), was of a different opinion;

(1) 16 C. B. 179. (2) 4 Q. B. D. 172, 186. (3) 3 Q. B. D. p. 113.

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and so was Brett, L.J., in the Court of Appeal (1). And, in *Little* v. *Wingfield* (2), the late Mr. Justice O'Brien puts it that the fact of a long uninterrupted enjoyment may be left to the jury as a ground for presuming a lost grant, if the origin of the possession and enjoyment be not otherwise accounted for. But the decisions of Lords Justices Thesiger and Cotton carry with them the authority of the majority of the Judges of the Court of Appeal sitting in the particular case, which it would, in my judgment, be impossible to disregard, and which do not, I think, conflict with the more recent judgment of the present Master of the Rolls in England in *Wheaton* v. *Maple* (3).

I therefore am of opinion that the twenty years' uninterrupted enjoyment having been found, the jury were justified in presuming and finding a lost grant.

That the easement thereby established is good in law as binding the particular estate of the owner of the servient tenement, whatever be the nature of that estate, I entertain no doubt. A lost deed of grant may be found as a matter of inference from secondary evidence of the former existence of such a deed, or (like the lost deed in the present case) as a matter of presumption from long enjoyment. In the latter case the presumption is, no doubt, based on a legal fiction. In the present case it must, in my opinion, be taken as a concluded fact, after the finding of the jury, that a deed of grant had existed. When the servient tenement is held under a tenancy, the operation of the lost deed, so for as duration is concerned, must be regarded as coterminous with the length of the term for which the lands are held. It cannot, having regard to the authorities, be successfully contended that such an easement could not be created, as would be binding for the period I have mentioned. The test to be applied is that of an actual existing grant. In my opinion, a tenant of a holding is entitled to grant an easement affecting his lands, which, according to the language of the deed, may subsist not alone during the continuance of the tenancy, but—in case the latter should be determined by surrender, or other voluntary act—during the period which would represent the residue of the term,

(1) 4 Q. B. D. 204. (2) 11 Ir. C. L. R. 75, 78. (3) [1893] 3 Ch. 48.

in case no determination had taken place. *Timmons* v. *Hewitt* (1) in the Court of Appeal, and *O'Kane* v. *O'Kane* (2) decide that the right to an easement, by a finding of lost grant, can be established when the fee is not necessarily bound.

That being so, I can see no difference in effect between an actual existing deed and the grant presumed to have existed and to have been lost. In the case of an existing grant for value, the grantor could not defeat the right he had created by a surrender of his tenancy. In my opinion, the merger of his interest in a higher one would not defeat it either, when such merger was effected by his own act, viz. the purchase of the fee simple. It would be inequitable that merger occasioned under such circumstances, could destroy rights which a surrender could not. In Co. Litt., 338*b*, it is stated that—"Having regard to strangers who were not parties or privies to the surrender, lest by a voluntary surrender they may receive prejudice, touching any right or interest they had before the surrender, the estate surrendered hath in consideration of law a continuance." The principle is recognised in *Saint* v. *Pilley* (3); and by Lord Justice Cotton in *Dynevor* v. *Tennant* (4), so far as voluntary assignments or surrenders are concerned. No doubt, Lord Herschell in the House of Lords (*Dynevor* v. *Tennant* (5)) expressed himself as not satisfied, "as at present advised," that when a covenant or re-grant was taken, as in that case, the rights conferred by it endure longer than the lease, however the lease may come to an end. But he does not decide the point, and cannot be regarded as having formed an opinion adverse to those I have referred to.

I therefore hold that whether the easement rests on an actual existing deed, or on a deed presumed to have been executed but now lost, it subsists during the term for which the servient tenancy is held, and that it cannot be determined by assignment, surrender, or by what I may designate as voluntary merger.

Having regard to the view I take, it is not necessary for me to consider the effect of the 8th and 9th sections of the Purchase of Land (Ireland) Act, 1885. Suffice it to say that, if there were

(1) 22 L. R. Ir. 627, 641.
(2) 30 L. R. Ir. 489.
(3) L. R. 10 Exch. 137.
(4) 33 Ch. D. 420, 426.
(5) 13 App. Cas. 279, at p. 292.

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any doubt in my mind as to the continuance of this easement after the vesting order, these sections would remove it. It was no part of the policy or effect of that statute to destroy such rights as the one in question, and, so far from doing so, I am opinion that the sections I have mentioned have the effect of continuing their existence.

I therefore think that the verdict in this action should not be disturbed.

ANDREWS, J.:—

The case was argued upon a motion on behalf of the plaintiff that judgment should be entered for him in the original action with nominal damages, and also that judgment should be entered for him on the counterclaim, or that a new trial should be ordered. In substance the action was for trespass for penning back water, whereby it flowed over the plaintiff's land, and the defence upon which the action was tried was a justification under a lost grant of a flow of water to a tank of the defendants, which grant authorized the erection, on the plaintiff's land, of a "weir" or "carry" which produced the flow, and justified the trespass complained of; and the counterclaim was for the removal of the "carry" by the plaintiff.

The Lord Chief Baron, before whom the case was tried at Belfast, left to the jury the three following questions—1, "Did Hugh M'Curdy Hamilton"—a predecessor in title of the plaintiff—"by deed now lost by time and accident, grant to James Pollock," one of the defendants, "and his successors in title to the farm held under his lease, liberty to erect a carry at the place at which it stood and to the height at which it was before the commencement of this action?" The jury answered, Yes. 2, "Did said Hugh M'Curdy Hamilton, or other the lessee of the farms now the plaintiff's, grant to James Pollock, and his successors in title to the farm held under his lease, that a portion of the water flowing at the point marked "weir" on the plaintiff's map, should flow through the hole in the fence, to the public road, and alongside such road to the defendant's tank opposite his house?" The jury answered, "Yes." 3, "Before the drainage operations of 1861, did any

water flow, as of right, from the placed marked "weir" on the plaintiff's map, to the public road, and from thence to the defendants, Pollocks' farm?" The jury answered, "No." Upon these findings, the learned Judge directed a verdict for the defendants, both on the claim in the original action, and on the counterclaim, with nominal damages on the counterclaim, and gave judgment for the defendants with costs.

Hugh M'Curdy Hamilton was the predecessor in title of the plaintiff, and held two farms, by leases of 1807 and 1836, of which he became assignee in 1861, and which, in 1867, he assigned to the plaintiff. The defendant, James Pollock, held an adjoining farm, by lease of 1858, under the same landlord. The maps proved by the plaintiff and the defendants at the trial are substantially alike.

[His Lordship then referred to these maps, stating that for convenience he would refer to the lettering on the map put in evidence by the plaintiff, and continuing]—

It is to be assumed now that, notwithstanding a conflict of evidence respecting it, the "carry" marked "weir," at the southern end of the plaintiff's land, was erected in or about 1861, when certain drainage work was being done there. Before this drainage, some water was taken from the plaintiff's land to the river called the "Killagan Water," by an old drain, the site of which is marked on the map [at C], which ran down to the river from the Ballycastle-road across the land of the plaintiff which lies east of the "weir."

I think it is clear upon the evidence, and I do not think it either could have been, or was in any way controverted at the trial, that the cut or channel to the west of this old drain, which runs from "B" on the Ballycastle-road, past "A" to the "weir," is a drain which was made about 1861, to improve the drainage of the plaintiff's land. The weir or carry was placed upon the plaintiff's land, and across this drain; and its object and effect were to send water, coming down the drain, over to the point "N." A mearing fence between the plaintiff's and the defendants' lands runs from the "weir" to "N," with a gripe, or "shough," on the plaintiff's side, the cleaning out and deepening of which enabled the water dammed up by the "weir," to pass to "N,"

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whence it flowed south to a tank opposite the defendants' house, which is marked "Pollock" on the map.

I shall now shortly refer to the evidence as to this drain from "B" past "A," to the "weir." John Mullen, the fifth witness for the plaintiff, and the owner of a scutch mill further down the Killagan river, who knew the locality for forty years, said that before Hamilton's time, the water that came to where the carry now is ran across the meadow through a pipe 1 foot in diameter, and fell into the Killagan water. The place to which the witness then pointed on the map [at C] is evidently where the old drain ran. Hugh M'Curdy Hamilton brought the water, which used to go through the old pipe across to the river, to "B," and thence from "B" to "S," where he returned it into the river. It is manifest from the evidence that this was part of the drainage work done in or about 1861. Mr. Pinkerton, an engineer, the first witness for the defendants, said he found the remains of an old pipe near "C" (on defendants' map), which led in the direction of the Killagan water. This was evidently the remains of the old drain. The defendant Nathaniel Pollock, third witness for the defendants, said—"I am 54 years of age; I know the place all my life; I remember when Hugh M'Curdy Hamilton came to the plaintiff's land; I was a boy at the time; sometime after I first remember the drain was sunk;"—From the rest of his evidence, I think that this must be the drain from "B," past "A" to the weir.—"The tank opposite our house was also sunk; the march drains were cleared, and a carry was put on; in Hamilton's time water could not come without the carry." What this witness refers to as the "march drains" must, I think, be the gripes along the mearing fences from the weir to "N," and from the weir to "S." By clearing out the gripe or "march drain" from the weir to "S," an outfall to the river was provided for the water brought down by the drain from "B" past "A" to the weir, where part of it was intercepted and sent to "N," whence it flowed to the defendants' tank. John Kerr, fourth witness for the defendants, said—"When M'Curdy [Hamilton] was a year or so there, he drained the property; I worked at the drains; he employed me; at that time the drain between the carry and the river" [the weir to "S"] "was not able to take any water at all . . . I was one of the men

who put up the carry." Further on he said—"When we commenced the drainage works, we deepened the course" [from the "weir" to "S" on the map]. "That course was not previously carrying any water."

Taking the evidence I have referred to, with other facts of the evidence which I have not thought it necessary to quote, and taking also the third question which was left to the jury and the answer to it, I do not think that it admits of any doubt that the cut or channel from "B" past "A" to the "weir" was made in or about 1861, for the drainage of the plaintiff's land, and to carry off water which the land had too much of, and which was an injury to it. This cut was an artificial drain made in the plaintiff's land by its then owner, manifestly for the benefit of the plaintiff's land. It was entirely within his own bounds and under his own control. It was apparently intended as an improvement on the imperfect drainage effected by the old drain, and was essentially of a character which the owner of the land could alter or improve at his pleasure. Its character was in no way like that of a presumably permanent channel, such as a channel to conduct water to a mill, and, in my opinion, although it appears to have been intended to be, and I assume was, an improvement on the old drain, it was clearly of as temporary a character as the old drain, and as open to alteration or abandonment at any time as the old drain was.

It seems to me that all this was quite apparent, and in no way the subject of any conflict of evidence or controversy at the trial; but, if it be suggested that any question respecting it should have been left to the jury, I think it was for the defendants, who were justifying the alleged trespass, to have asked that any such question should have been so left. The evidence as to this seems to me, however, so clear that I think no one at the trial could have looked upon it as otherwise than all one way.

Regarding it then in this light, I come to the consideration of whether there was any evidence to sustain the findings on the first and second questions left to the jury—in other words, whether such a lost grant as is therein referred to could be legitimately inferred from or found upon the evidence. Serjeant Dodd, it is true, did not put his requisition for a direction for the plaintiff on this

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ground, but he asked for a direction for the plaintiff in both the original action and the counterclaim. We are now to give the judgment that ought to have been given; and, if the plaintiff was entitled to judgment for him at the trial, the omission, in the requisition for it, of a ground on which he was entitled to it, or even the fact that he put the requisition on a wrong ground, ought not, in my opinion, in a case like the present, to deprive him of the right to get from the Court now the judgment he was entitled to then.

This brings me to a consideration of the law.

Now—although it was held by the Chief Baron, in the case of *Timmons* v. *Hewitt* (1), in a judgment in which I concurred, that when two parcels of land are held from a common landlord under tenancies each of which has existed for upwards of twenty years, it is competent for the jury to infer, from twenty years enjoyment, *as of right*, and without interruption, of an easement claimed by the owner of one of the tenements over the land of the other tenant, a grant from the one tenant to the other tenant of such easement—still it is essentially necessary that the enjoyment should have been *as of right*. If its character has not been as of right, the length of the enjoyment is immaterial. In the cases to which I am about to refer, the facts were not identical with all the facts of the present case, but I think the principles laid down in them, and the reasons of the decisions, are applicable.

The cut or channel from "B" past "A" to the "weir," which was placed across it in or about 1861, is clearly, in my opinion, as I have already said, an artificial drain, made for the better drainage of the plaintiff's land, and, from its very nature and purpose, was under the control of and capable of being, as well as liable to be, altered or abandoned by the owner of the land at his pleasure. In my opinion, therefore, it must be regarded as of a distinctly temporary character, and open at any time to be removed, or improved, by the owner of the land for the benefit of which it was made. There is no doubt that what was said by the Court of Queen's Bench in *Magor* v. *Chadwick* (2), that it was no misdirection to tell the jury that the law

(1) 22 L. R. Ir. 627, 641 (see at p. 637). (2) 11 A. & E. p. 586.

of watercourses is the same whether natural or artificial, is, as a general proposition, too wide. In *Wood* v. *Waud* (1), which in *Rameshur Singh* v. *Koonj Pattuk* (2) was regarded by the Privy Council as having been correctly decided, the Court said, "We entirely concur with Lord Denman that the proposition that a watercourse, of whatever antiquity, and in whatever degree enjoyed by numerous persons, cannot be enjoyed so as to confer a right to the use of the water, if it be proved to have been originally artificial, is quite indefensible; but, on the other hand, the general proposition that under all circumstances the right to watercourses arising from enjoyment is the same, whether they be natural or artificial, cannot possibly be sustained. The right to artificial watercourses, as against the party erecting them, surely must depend upon the character of the watercourse, whether it be of a permanent or of a temporary nature, and upon the circumstances under which it was created. The enjoyment for twenty years of a stream diverted or penned up by permanent embankments must clearly stand upon a different footing from the enjoyment of a flow of water originating in the mode of occupation or alteration, of a person's property and presumably of a temporary character and liable to variations." Further on, the Court said—"The flow of water from a drain for the purposes of agricultural improvements for twenty years could not give a right to the neighbour, so as to preclude the proprietor from altering the level of his drains for the greater improvement of his lands."

As agreeing with this, I refer to the case of *Greatrex* v. *Hayward* (3), in which Baron Parke said:—"The right of a party to an artificial watercourse as against the party creating it must depend upon the character of the watercourse, and the circumstances under which it was created"; and the Court, considering that the watercourse in question in that case was of a temporary nature only, also considered that no right had been acquired by the enjoyment for twenty years.

In *Arkwright* v. *Gell* (4)—where mills had been erected by the owner of the dominant tenement by the side of a sough, by means of which the owner of the servient tenement had drained his mines,

(1) 3 Exch. 748.
(2) 4 App. Cas. 121.
(3) 8 Exch. 293.
(4) 5 M. & W. 203.

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the Court held that twenty years user of the water for the purposes of the mills did not give a right to the discharge of the water, either from the presumption of a grant, or by the force of the statute, 2 & 3 Wm. 4, cap. 71, s. 2—Lord Abinger said :—"This was an artificial watercourse, and the sole object for which it was made was to get rid of a nuisance to the mines . . . and the flow of water through that channel was, from the very nature of the case, of a temporary character. . . . At common law, . . . a user for twenty years, or a longer time, would afford no presumption of a grant of a right to the water in perpetuity, for such a grant would in fact be neither more nor less than an obligation on the mine-owner not to work his mines by the ordinary mode of getting minerals below the level drained by that sough, and to keep the mines flooded up to that level in order to make the flow of water constant for the benefit of those who had used it for some profitable purpose. How can it be supposed that the mine-owners here could have meant to burden themselves with such a servitude, so destructive to their interests?" And, further on, Lord Abinger said :—"The user, even for a much longer period than twenty years, whilst the flow of water was going on for the convenience of the mines, would afford no presumption of a grant at common law as against the owner of the mines."

The present case is one between Hanna, the owner of the artificial drain from which Pollock received a supply of water, and Pollock; and it is therefore unnecessary to discuss the question as to the acquisition by enjoyment of rights as between several persons through whose lands the flow from a temporary artificial channel passes, while that flow continues.

Applying then to the present case the principles and reasoning of the cases I have referred to, a grant cannot, in my opinion, having regard to the facts, be presumed, against the lessee of the plaintiff's land, which would in effect impose upon him the obligation, during the subsistence of his lease, of not only maintaining his drain in the place where it was made, but of keeping it, with the "carry" across it, for the benefit of his neighbour, unaltered and unimproved in any way which would interfere with the supply of water his neighbour derived from it, although a better drain, for his own purposes, might be substituted for it, or, by alteration

and improvement in its levels, or otherwise, it might be made more effective for the purpose for which it was constructed, viz. taking the excessive amount of water which injured his land away from it.

Such a grant would render the very purpose for which the drain was made subservient to the benefit his neighbour derived from it. It is said that the evidence shows that some work was done by the defendants in relation to the drainage which would render such a grant more possible, or, as I would express it, less impossible. The largest estimate of any work done by the defendants cannot bring it up to anything considerable; but, whatever it was, it may no doubt have assisted him in getting the "carry" put up. It is one thing, however, to allow a neighbour to get a supply of water from a drain, by means of a "carry," while the owner of the drain chooses to keep the drain in the place and condition in which it stood when the "carry" was put across it, and a wholly different thing to impose on the owner of the drain the obligation of maintaining that supply, no matter how much it might be for his interest to remove the drain and substitute a better one, or to improve it so as to make it more useful for his own purposes, and more effective for draining his land.

In my opinion, the defendants' enjoyment of the supply they received is not capable, under the circumstances, of being regarded as of right. I think that it must be regarded as having been permissive only—which, to my mind, is the infinitely more probable and reasonable view of it, and is in no way inconsistent with the actual enjoyment. The case of the defendants at the trial was rested on the presumption of a grant. The case, which was also presented in the statement of claim, in relation to which some evidence was given at the trial, of a parol agreement acted upon by both parties in such a way as to supply a consideration, was not, in the end, relied upon for the defendants, nor required to be tried; and I need not therefore investigate it.

As the case stood at the close of the evidence, and up to the time when judgment was given, the plaintiff was, in my opinion, entitled to a direction in his favour, in the original action for nominal damages, and upon the counterclaim; and therefore, in my opinion, the verdicts and judgments entered for the

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defendants should be set aside, and verdicts and judgments should be entered for the plaintiff accordingly, with costs.

The conclusion at which I have arrived, and on which my judgment is based, renders it unnecessary for me to discuss, or decide, the questions which were argued as to the effect of the vesting orders under the Land Purchase Acts, which the plaintiff, and the defendant James Pollock, respectively, obtained in 1894, prior to the commencement of this action. I therefore express no opinion on those questions, which may arise and become the subject of necessary consideration and decision hereafter.

MADDEN, J. :—

While this case was under my consideration, I had the advantage of reading the judgment that has now been delivered by Mr. Justice Andrews, and I find that he has expressed fully, and with great clearness, the conclusions at which, upon a careful examination of the evidence and the authorities, I had myself arrived. I therefore adopt his judgment.

My brother Boyd, who is engaged in another Court, has authorized me to state that he also agrees with my brother Andrews both as regards his conclusions, and the reasons on which they are based.

The order therefore of the Court will be that the verdicts and judgments entered for the defendants will be set aside, and that judgment will be entered for the plaintiff, in the original action, for nominal damages, with costs, and also upon the counterclaim, together with the costs of this argument.

Solicitor for the plaintiff: *J. K. Currie.*
Solicitor for the defendants: *R. C. Martin.*

A. E. R. J.

IN THE MATTER OF AN APPLICATION BY NOBLE WILLIAM JOHNSON, SECRETARY AND TREASURER OF THE GRAND JURY OF THE COUNTY OF CORK (1).

Q. B. Div. 1898. June 9, 20.

Practice—Equitable execution—Money payable under Grand Jury contract—Maintenance of public road.

A receiver by way of equitable execution cannot be appointed over the amount payable on foot of a Grand Jury contract for maintaining a public road until the work, the subject-matter of the said contract, has been duly executed, according to the terms of the contract, up to the date of the assizes.

ADJOURNED INTERPLEADER SUMMONS.

On 28th May, 1897, the Hibernian Bank, Limited, entered judgment against P. O'Sullivan for £94 16*s.* 4*d.* debt, and £4 16*s.* costs, making together £99 12*s.* 4*d.* The defendant held a contract from the Grand Jury of the county Cork to maintain a certain road in that county for five years, at £123 7*s.* 6*d.* a-year, payable in half-yearly instalments of £61 13*s.* 9*d.* each at each assizes during such period; and, by the terms of his contract he was, subject to the approval of the county surveyor, entitled at the Cork Spring Assizes, 1898, to payment of £61 13*s.* 9*d.*, being the half year's instalment then payable on foot of such contract for work executed up to said date. The plaintiffs' judgment was unsatisfied; and on the 10th March, 1898, the plaintiffs obtained an order appointing their manager receiver by way of equitable execution over said sum so payable as aforesaid, and said order was duly served on 16th March, 1898. On the 10th March (the date of order) the defendant, by power of attorney, assigned over his interest in the same sum to his surety in the contract. It appeared by the affidavits that the defendant in the previous November, and prior to the Presentment Sessions, duly lodged with the secretary of the Grand Jury an application for the payment to him of the said sum at the next ensuing assizes; and

(1) Before GIBSON, BOYD, and KENNY, JJ.

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that the county surveyor duly and in accordance with the provisions of sect. 130 of 6 & 7 Wm. 4, c. 116, and 58 Vict. c. 8, s. 1 (2), certified that such work had been duly executed up to seven days before the holding of such Presentment Sessions; and that said Presentment Sessions (held in November, 1897) duly allowed such application for payment at the Spring Assizes, 1898. The Spring Assizes were opened on 14th March, 1898, on which day the county surveyor duly certified that the defendant had duly executed the said work up to the said date according to the terms of the contract; and the Grand Jury duly allowed such application, and ordered payment accordingly. The surety to whom the defendant assigned his interest in the money then claimed the said amount. The secretary of the Grand Jury then issued a summons requiring the Hibernian Bank, Limited, and the claimant to interplead.

By the affidavits filed on behalf of the claimant, the question as to the legality of the receiver order was raised.

At the suggestion of the Judge in Chamber the summons was adjourned into Court.

H. D. Conner, for the Secretary of the Grand Jury.

Redmond Barry, for the claimant:—

The receiver order should be set aside. It was ineffectual to attach the money, afterwards assigned to the claimant. On 10th March, when the order was made, there was no certificate of the county surveyor showing that the work had, in accordance with the terms of the contract, been completed. There could not be such a certificate, because the contract required that the work should be duly executed "up to the said ensuing assizes," that is, the 14th March (see 58 Vict. c. 8, s. 1 (2)); and as a matter of fact there was no certificate till 14th March. Therefore there was no sum in existence to be paid till 14th March, after the receiver order was made, nor was there any means of knowing on 10th March whether there would be any sum to be thereafter paid; because, first, the certificate to be produced at the Presentment Sessions under the above Act shows only the amount of work done up to the seven days before the Sessions; secondly, the county surveyor

might refuse his second certificate to be laid before the Grand Jury, and, thirdly, the payment on foot of a Grand Jury contract is indivisible. Therefore there was on 10th March nothing to attach. Besides future accruing earnings cannot be attached: *Holmes* v. *Millage* (1). The right to appoint a receiver by way of equitable execution is co-extensive with the jurisdiction of the Court to grant equitable relief before the passing of the Judicature Act.

Harley, for the plaintiffs:—

Holmes v. *Millage* is distinguishable. That case dealt with the case of a salary; but the present case deals with payment for work done. In *Tracey* v. *M'Cabe* (2) an order was made appointing a receiver over sums presented on foot of a road contract, although at the time the order was made there was no certificate of the county surveyor; but as appears by the note of that case the receiver who was authorised to apply for payment in the name of the contractor, subsequently, on the certificate of the county surveyor, obtained payment. Before the Act 58 Vict. c. 8, only one certificate was necessary to entitle the applicant to apply for and obtain payment; and that had to be laid before the Presentment Sessions. As the Sessions are usually held some months before the Assizes, it is clear that such a certificate was necessarily provisional. Yet the uniform practice has been as such certificate had been given to grant these orders. Should this order be set aside it would facilitate judgment debtors who hold these contracts to evade their creditors by immediately after the passing of payment by the Grand Jury, and before it would be possible for the plaintiff to obtain an order to protect his interests, assigning over to a third person the money ordered to be paid.

Cur. adv. vult.

June 20.

GIBSON, J.:—

The plaintiff in this case obtained a receiver order on March 10th over the earnings of the defendant in respect of a certain road contract. The order was served on the 16th. On the same day that the order was made the defendant assigned over the moneys pay-

(1) [1893] 1 Q. B. 551.

(2) Brett's Grand Jury Law (2nd ed.), pp. 2, 3, and xxi., xxii.

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able under his contract to his surety in the road contract for what would be apparently valuable consideration. The *bona fides* of this transfer is impeached. In the previous November, the defendant had obtained an *interim* certificate from the county surveyor, and on the 14th March the county surveyor certified that the work had been duly maintained by the contractor, who then became entitled to the sum of £61 13*s.* 9*d.* There is no evidence that the contractor did any work on the road between March 10th, when the order was made, and the 14th, when the certificate was given, but the county surveyor states in his affidavit that the road, the subject of contract, was one which required constant attention.

On the hearing of the application it was agreed that the case should be dealt with, as if a motion to discharge the receiver order had been duly served.

On behalf of the surety, Mr. Redmond Barry relied on *Holmes* v. *Millage* (1) as establishing that a receiver order could only be made where the property affected could, previously to the Judicature Act, have been made available by some process either at law or in equity; and he contended that the only equitable remedy, sequestration, was not applicable, as there was no money earned until the certificate was given; the contract was entire, and until the 14th it was not performed. The view of *Holmes* v. *Millage* (1) presented by counsel is, I think right, and as that case has always been accepted as a binding authority (*Cadogan* v. *Lyric Theatre* (2)), the only question for consideration is, whether sequestration before the Judicature Act could have been made and could have reached the sum in question on the 10th March.

As a general rule sequestration only affected realized property, and there are authorities in Ireland which seem to lay down that the writ would not affect dividends on Bank Stock, *M'Carthy* v. *Goold* (3), or bygone rents, *Egan* v. *Heenan* (4). I doubt if these authorities would now be followed. A debt, a chose in action, could be seized under the writ, as the cases cited in Seton show (see also *Miller* v. *Huddleston* (5)); but I am not aware of any authority

(1) [1893] 1 Q. B. 551.
(2) [1894] 3 Ch. 338.
(3) 1 B. & B. 387.
(4) Fl. & Kelly, 39.
(5) 22 Ch. D. 233.

that money to be earned under an unperformed contract could have been made the subject of sequestration. The contract in the present case could not be performed until the 14th March; the amount payable was indivisible, and though it is probable that all the work was done before the 10th, the contract was open, and the money was not earned on that day. The inconvenience of the Court seeking to apportion the earnings on an entire contract is obvious. If the contract could not have been made the subject of sequestration on the 10th, the receiver order must be discharged. Orders like that before us have, I believe, been previously made, but the objection now urged was not brought to the attention of the Court. The objection seems well founded.

BOYD and KENNY, JJ., concurred.

The order of 10th March set aside: the Hibernian Bank to pay the applicant £5 5*s*., and the claimant £4 4*s*.

Solicitors for Hibernian Bank: *P. W. Bass & Co.*
Solicitors for Grand Jury: *T. Exham & Sons.*
Solicitor for claimant: *P. O'Donovan.*

J. P. B.

Appeal.
1898.

PETRIE *v.* OWNERS OF SS. "ROSTREVOR" (1).

Jan. 31.
Feb. 1, 2, 22.

Negligence—Navigation—Tidal river—Oyster beds laid down by trespasser—Grounding of ship without negligence—Standard of care and skill required in the avoiding of damage to the property of a trespasser.

The Newry Navigation Company were a corporation established by statute for carrying on the navigation in the Newry River, and through Carlingford Lough to the sea. The river from Newry to Warrenpoint, where it enters the Lough, is about seven miles long, and the bed had been deepened by dredging for the purposes of navigation by the Company.

The plaintiff had laid down some oyster beds in the Newry River on the southern shore. In 1889 and in 1894 he took portion of the fore-shore from the tenants of lands abutting on the river, but he had no title to any part of the bed and soil of the river, and in the opinion of the Court of Appeal, on the evidence, he was not even lawfully in possession of the site of the oyster beds. He twice applied to the Fishery Inspectors for a license to lay down oysters, but his applications were refused. A correspondence ensued between him and the Navigation Company, for the purpose of obtaining a lease of the beds from them. The Company refused to grant a lease, and more than once warned him to take away his oysters, as they were about to commence dredging operations.

On the 10th December, 1895, the "Rostrevor," a screw steamer the property of the defendants, while proceeding down the Newry River, accidentally went ashore at the place where the plaintiff had laid down his oysters, and her bow stuck in the ruins of an old beacon. It was two hours after high water and she lay there till the return of the high water. Shortly before the return of high water the captain got her off, and in doing so he used the propeller as well as a hawser attached to a post on the opposite shore. The captain deposed that he was ignorant of the existence of the oyster-beds, but it was proved by some witnesses that at low water, portion of the vessel was high and dry, and the oysters were visible all round her. The plaintiff's oysters were damaged very considerably by the vessel in taking the ground, and still more so in getting her off :—

Held, that there being no sufficient evidence of recklessness or gross negligence on the part of the captain, the plaintiff was not entitled to recover damages for the injuries to the oysters.

The standard of care and caution by the owner of a ship lawfully using

(1) Before Lord Ashbourne, C., and FitzGibbon and Holmes, L.JJ.

the water way of a navigable river towards a trespasser thereon considered, and the analogous authorities upon negligence discussed.

Per Lord Ashbourne, C. The captain was entitled to get off his ship, by any reasonable exercise of seamanship that his own reasonable knowledge might suggest. He was bound not to be reckless or careless, so as to injure the oysters; but within that he was entitled to do anything that he reasonably could, to effect what was necessarily his primary object and purpose, viz. to get away his ship safe, exercising his skill and judgment *bona fide*, and fairly avoiding, as far as he could, any reckless, negligent, or careless action that might be detrimental or dangerous to the oysters.

Per Fitz Gibbon, L.J. The captain was entitled to use all reasonable means, according to the best of his judgment, to take his ship out of the position in which she lay; and though he was bound to the plaintiff, in using those means, not to recklessly or wilfully injure the oysters, his first duty and right was to do everything which seemed reasonable to get his own ship off.

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THE Newry Navigation Company was established for the purpose of carrying on the navigation in the Newry River and Carlingford Lough, and for that purpose had procured certain Acts of Parliament, commencing with 10 Geo. 4, c. cxxvi. and going down to 47 & 48 Vict. c. cxxxviii. The Newry River, portion of their property, flows from Newry to Warrenpoint, separating the county of Down from the counties of Louth and Armagh, a distance of about seven miles, where it enters Carlingford Lough, and it was vested in the Company by the provisions of these statutes.

The plaintiff was a fish merchant in Liverpool, who had laid down some oyster beds in the Newry River, at Cornamuckla, on the southern or county Louth shore. In 1889, he first took portion of the foreshore from the tenants on portions of the lands abutting on the river; he took further portions down to 1894, and he had been in possession ever since. He twice applied to the Fishery Inspectors for a license to lay down oyster beds in portion of the Newry River, but he was refused upon both occasions. A correspondence ensued between the plaintiff and the Newry Navigation Company commencing in September, 1892, in which the Company warned the plaintiff against laying down the oysters in the river, and that as they were going to commence dredging operations the plaintiff's oysters were there at his peril. Notwithstanding promises by the plaintiff to remove his oysters, he continued to lay down oysters, and finally on the 3rd July, 1893, the plaintiff,

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through his solicitor, wrote to the Company and asked for a lease of the portion of the shore where his oysters were deposited. This offer was refused.

On the 10th December, 1895, the "Rostrevor," a screw steamer, was proceeding down the Newry River, on a voyage to Swansea. At Cornamuckla there is a bend in the river, and the captain of the "Rostrevor" instead of keeping in the centre of the fair-way of the river, directed his course straight from point to point. At that moment a squall struck the vessel on her port bow, and she took the ground at a place on the foreshore where the plaintiff had laid down oysters. The channel was there about 120 feet wide, and the "Rostrevor" was 120 feet long. After grating over some yards of the foreshore, her bow stuck in the remains of an old beacon. There was no mark, or post, either on the land, or in the water to show where the oyster beds were, and the captain of the "Rostrevor" did not know of their being there. At low water the vessel was lying on the shore, and there was no water round her. Two witnesses for the plaintiff deposed that the oysters were then plainly visible. It was high water that morning at 5.11 a.m., and the vessel went ashore about 7 a.m. She lay there till between 4 and 5 p.m., lying broadside to the river. As the tide was ebbing the captain resolved not to attempt to get off till high water. About 5 p.m. he ran out a kedge to the opposite side of the river, and attempted to get her afloat by the use of the steam winch and two warps. There was a severe strain on the warps, one of which parted. Fearing that she would not get afloat before the tide turned, the captain reversed the propeller and the steamer was got afloat. Some of the blades of the propeller were broken in getting her afloat, and the track by which she was moved over the ground to get afloat was different from the place where she took the ground. In going ashore, and also in getting her afloat a large number of the oysters were destroyed. Petrie brought a suit in the Queen's Bench Division (Admiralty) against the owners of the "Rostrevor" for the damage done by the grounding of the vessel (1).

(1) The following judgment was delivered by Johnson, J., in the Queen's Bench Division (Admiralty):—

The statement of claim alleges that the plaintiff was possessed of an oyster

Serjeant Dodd, *Campbell*, *Q.C.*, and *M. J. Dunne*, for the defendants, the appellants:—

As the plaintiff had no title to the *locus in quo* where he laid his oysters, he cannot maintain an action of negligence against us, in the absence of proof of malice. There was no malice, as the captain was ignorant of the fact that the oysters were there: *Mayor of Colchester* v. *Brooke* (1). That case was decided on a question of pleading. The grant of an oyster-bed in a navigable river is subject to the public right of navigation: *Gann* v. *Free Fishers of Whitstable* (2). Therefore, so far as the damage to the

bed sufficiently marked out and known, being part of the foreshore of the Newry River where the tide ebbs and flows, at Cornamucklagh, county of Louth, with oysters on it; and (1st) that the defendants' ss. "Rostrevor," while steaming down the river, by the negligence and want of skill of defendants by their servants, left the fairway and ran aground on the oysters and injured them; and (2nd) that afterwards defendants by their servants so negligently and unskilfully moved the steamship from the place where she grounded that she damaged other parts of the oyster bed and oysters.

The defendants, by their statement of defence, traverse all averments, and allege that while the steamship was being navigated with reasonable skill and care she grounded; that she was removed from the oyster bed with reasonable care and skill; that the grounding was an inevitable accident: and that there was no damage.

The Newry River is a public navigable river, of which the bed and soil (including the place where the "Rostrevor" went ashore) is, by the Newry Navigation Acts, 1829 and 1884, vested in the Newry Navigation Commissioners, subject to the public right of navigation on payment of specified tolls, which are applied in the improvement and maintenance of the navigation of the river. The tide ebbs and flows from Warrenpoint to the head of Carlingford Lough to Newry, and is controlled by locks. For many years tenants of landowners adjoining the river foreshore (including the *locus in quo*) were in the habit of dredging up the natural oysters from the bed of the stream, placing them on the foreshore adjoining their holdings, and selling them. The plaintiff is an English merchant possessing capital and energy, and this local practice appears to have suggested to him the establishment in the locality of a regular oyster bed. Accordingly, he obtained lettings of foreshore for short periods from the tenants of adjacent holdings, first, in 1889, and later in 1894, and laid down oysters in those places annually, in March or April, and lifting oysters from the bed and exporting them to England up to the ensuing November, but having oysters all the year round in the bed. These tenants had no title to make such lettings, and I am disposed

(1) 7 Q. B. 339. (2) 11 H. L. Cas. 192.

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oysters by the grounding of the vessel is concerned, the owners cannot be held liable, as we had no duty towards the plaintiff. Liability for negligence can only arise when there is some duty to the plaintiff: *Heaven* v. *Pender* (1); *Le Lievre* v. *Gould* (2). We further contend that we are not liable for negligence in getting off. Being placed in circumstances of difficulty, the captain was only bound to use due and reasonable skill: *The Octavia Stella* (3); *Romney Marsh* v. *Trinity House* (4). The captain did not see the oysters at low water, when the vessel was aground.

to think that the plaintiff took them more with the object of preventing and conciliating local opposition to his enterprise than with any notion that he thus obtained any title. The Fishery Inspectors refused to give the plaintiff a license for this oyster bed, and he unsuccessfully tried to arrange for possession of it with the Navigation Commissioners who exercised rights of ownership over the foreshore, and in 1892 and 1893 required him to remove his oysters from parts of the foreshore which they wanted for depositing the stuff dredged by them out of the channel. The plaintiff complied with the requirements of the Commissioners, and never marked out or defined, or attempted to mark out or define, by buoy, post, or otherwise, in any way the site of this oyster bed, except by a ridge of stones averaging a foot in height marking off the oyster bed from the river channel. By gradual encroachment the plaintiff extended this oyster bed towards the north, on the foreshore, to within 12 or 16 feet from the nearest part of the channel on the Louth side, including the *locus in quo* where his oysters were first laid in 1893 or 1894. The oyster bed and the small stone ridge uncover and are visible at low water, and it was common knowledge in the neighbourhood and to the river pilots and others who at low water navigated the river that this oyster bed was there. Ferguson (the master of the "Rostrevor") had formerly known the river for many years, and had been mate in the "Rostrevor," but had left her for some years before October, 1895, when he returned and obtained charge of her. The oyster bed had then been for a little more than one year on the place where the "Rostrevor" grounded. It does not appear that "oyster beds" were marked on any chart to which the master of the "Rostrevor" had access. Even in the latest corrected Admiralty Chart, 1891, the words "oyster beds" indicate that they lay on the south of the northern leading lighthouse, while the *locus in quo* lies to the north of that lighthouse. Ferguson says he was not aware of the oysters, or even of the ruins of the old perch (which at low water were about 3 feet over the mud, and not visible at high water), and that he never came into the river after two hours from high water, so that he would not have seen that which was visible only at low water. I think, therefore, that

(1) 9 Q. B. D. 302.
(2) [1893] 1 Q. B. 491.
(3) 6 Asp. Mar. Cas. 182.
(4) L. R. 5 Ex. 204.

The Queen's Advocate (*Ronan, Q.C.*), *Henry, Q.C.*, and *Sandford*, for the respondent:—

If oysters be placed in the channel of a public navigable river so as to create a public nuisance, a person navigating is not justified in damaging such property by running his vessel against it, if he has room to pass without so doing: *Mayor of Colchester* v. *Brooke* (1). Once an interference with property, of which a person is in possession, is proved, it lies on those who have interfered to justify: *Corporation of Hastings* v. *Ivall* (2). We admit that we

the fair inference from the evidence is that when the disaster occurred the plaintiff was *de facto* in possession of the oyster bed in question on the *locus in quo*, without title or authority to place or keep oysters there beyond mere possession in fact; that this oyster bed was only visible at low water, and its position in no way defined, except by the ridge of stones also visible only at low water, and that Ferguson, the master of the ss. "Rostrevor," was in fact ignorant of the position of the oyster bed, and even of its existence.

The ordinary and proper course of navigation down the river from Narrow Water, Oldcastle, is in a line which leads midway between the two beacons to the south. The master of the "Rostrevor" states that he knew this to be the proper course, and also knew that on the ebb the current set off the Down and on the Louth shore, where the "Rostrevor" went aground. He also states that he had long experience of the river before he became master of the "Rostrevor," and of the squalls to be met with in the river.

On the 10th of December, 1895, it was a neap tide, and, by the admission of counsel on both sides, it was high water at Newry at 5.9 a.m. and 5.42 p.m., the difference in high water between Newry and Warrenpoint is 2 minutes, and the place where the "Rostrevor" went ashore is about 3 miles from Newry. A little after 6 a.m. on the morning of the 10th of December, 1895, the "Rostrevor," with a cargo (not a full cargo) of oats, and drawing 9 ft. 9 in. aft, and 8 ft. or a little more forward, cleared the lock at Newry, and proceeded down the river The morning was clear, the wind from the east and squally, the ebb had run out about one hour, and she was at half speed, about from 4 to 5 knots. The officers of the steamer were in their proper places: the master on the bridge steering; the first mate on the forecastle head, on the lookout, and the second mate looking out aft. When the steamship arrived off the old castle at Narrow Water, the master, instead of steering his proper course for the midway between the two beacons to the south, kept in to the Louth or starboard side of the channel, which necessarily brought him close to the north end of the oysterbed. The reason which he gave was that a bend in the river prevented him from seeing down the river at this place, whether

(1) 7 Q. B. 339. (2) L. R. 19 Eq. 558.

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had no title to the *locus in quo*, but we were in possession. If the master of the "Rostrevor" did not know of the oysters being there when the vessel went ashore, at any rate he knew of their being there at low water, because the oysters were visible then, and it was when the vessel was being got afloat that most of the damage was done. In *Smith* v. *London and South Western Railway Company* (1) the defendants could not have had any notice of risk of damage to the property. If the defendants were negligent they are responsible to the plaintiff for the injury

there might not be a vessel coming up stream, and therefore he kept his starboard hand so as properly to pass any such vessel. The account of the disaster given by the master and his two mates is that a strong, sudden gust of wind from the eastwards "ketched" the "Rostrevor" on her port bow, and canted her head over to starboard; that the first mate immediately sung out "Starboard" and was answered by the master from the bridge "Starboard." Still the steamship did not turn to port at once; whereupon the first mate sung out the second time "Starboard!" and was answered from the bridge by the master "Hard a-starboard"; but the vessel took the ground immediately.

For a short time the engines were reversed, but the propeller failed to give her steerage way; she forged a-head over the ground till she stopped with the bluff of her starboard bow on the stone runs of the old perch. I can give no credit to this evidence. The general accuracy of Mr. Meares' map is not challenged: it was made from observations at low water on the 13th of December, after the "Rostrevor" had gone away, but while the marks and traces which she left behind her, and which are indicated on Mr. Meares' map, were fresh and visible. I am advised that if a sudden gust or squall had, as alleged, caught her on her port bow, and canted her over to starboard, her heel, so much deeper in the water than her forward draft, would have slewed her stern down the river with the ebb (running fast enough to belly out the lead line when sounding, and make it difficult for the first mate to get a perfect sounding in a little more than 2 fathoms), and then the track of the steamship on the ground ashore would have been more away from the bank and channel than her actual track was as shown by the line N, B, C, in Mr. Meares' map, and her head in all probability would have been more inland than the ruined perch. I am also advised, and it is my own opinion, that the master's excuse for not keeping the ordinary and proper course of navigation is not sufficient. He had many years experience of the river, and had met with squalls on it, and knew the set of the current on the Louth shore at the *locus in quo*. He ought, therefore, with ordinary skill and prudence, to have kept the regular mid-river course from the old castle to mid-stream between the two beacons; and if, by reason of a

(1) L. R. 6 C. P. 14.

that resulted from their conduct, although they could not have reasonably anticipated that such injury would be caused by it. The owner, who dedicates to public use as a highway a portion of his land, parts with no other right than the right of passage to the public: *The Vestry of St. Mary Newington* v. *Jacobs* (1). The right of navigation is simply a right of way, and not a right of property: *Orr Ewing* v. *Colquhoun* (2). If a person uses a highway for purposes other than its use as a highway, he is a trespasser: *Harrison* v. *Duke of Rutland* (3). The way in which the master of

bend in the river, or the configuration of the land, his vision was impeded so that he could not have notice of a vessel coming up stream (if any), he ought to have proceeded cautiously, slowing down if necessary, and kept his vessel well under control until he was able to command a clear uninterrupted view of the river before him. But this account of the squall was not originally mentioned; it never was entered in log or protest. The log entry is unreliable: it represents that the steamship went ashore—"lay in a good position." In his very confused evidence in this Court the master says this was untrue; he first had stated that the first mate had made the entry, and that he (Ferguson) read and signed it, knowing it to be untrue.

The first mate (Scott) was called, and said to me that he occasionally keeps the log, and that when he did not it was kept by the chief engineer. Subsequently I asked him if he could read and write. His answer was that he could read a little, but could not write at all; and it then transpired that the entry in the log under date 10th of December was made by the chief engineer after the log-book had been taken ashore out of the vessel, and then brought back; and on production this was, even for a coasting steamer, a singular log-book. The evidence of the master and first mate being such as it is, I cannot trust its accuracy; and though the second mate (a stranger to the river, and only two months on it) gave the same account, I think his recollection was more influenced by a feeling of loyalty to his comrades than by accuracy of his memory.

From a careful consideration of the evidence I infer—and if it is for the assessor it is his opinion also—that the master, to shorten his distance and expedite his voyage, instead of keeping his known and regular course from the old castle at Narrow Water (as in common prudence he ought to have done), tried to make a shorter and more direct course, kept too close in to the edge of the channel on the Louth side, and went ashore very much in the line he was steering down the river. And my opinion is, that if he had not gone ashore where he did, he would in all probability, on the same course, have gone ashore a little further down the Louth side of the channel. The defence of inevitable accident, therefore, in my opinion, fails.

(1) L. R. 7 Q. B. 47. (2) 2 App. Cas. 839. (3) [1893] 1 Q. B. 142.

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the "Rostrevor" used the propeller in trying to get off was gross negligence. He ploughed up several acres of ground. In *Johnson* v. *Barrer* (1), it was decided as the second proposition that in a case like this an action of trespass will lie. The first point decided was, that the quay belonged to the king, and then it was held that an intruder on the king's possession might maintain trespass against a stranger. See Pollock on Possession, pages 31 and 148. Actual possession is sufficient to entitle a party to bring an action of trespass against a wrong-doer: *Harper* v.

I am satisfied on the evidence that in trying to fetch stern-way while going ashore the propeller of the "Rostrevor" tore up part of the oyster bed marked on Mr. Meares' map by the small red square. Ferguson says his propeller broke going ashore. In this he is contradicted by the defendants' witness, Hollywood, who says the corner of the blades was chipped, but the propeller was not broken, though afterwards, on the survey of the steamship, two blades were found broken. I am advised, and indeed it is plain, that the master did not use ordinary care and skill in the navigation of the river. As the consequence of this he went aground and injured the plaintiff's oyster beds, which he did not know, and had no notice, were there. In my opinion he would have been liable for this running on the oyster bed, of which plaintiff was in actual possession (though, as I have said, without authority or title), if he had known or had noticed it was in that place, and which he might then, by the exercise of ordinary skill and care in navigation, have avoided; and I think (not without hesitation) that he was not less liable because he was in fact ignorant, and had not notice of the existence, of this oyster bed, or because it was on the foreshore and not in the channel.

In *The Mayor of Colchester* v. *Brooke*, Lord Denman (p. 377) says, in dealing with the question of a private individual taking upon himself to abate a nuisance by wilfully impinging on an oyster bed, while he had plenty of room to pass without doing so, "If the defendant could not have done this purposely and knowingly, the same principle shows that he was bound to use due care and skill in the navigation of his vessel so as not to do it unwittingly by want of these. As a general rule of law everyone in the conduct of that which may be harmful to others if misconducted, is bound to the use of due care and skill, and the wrong doer" (in the present case the plaintiff, who had the oyster bed there without authority or title) "is not without the pale of the law for this purpose." The duty of the defendants, by their servants, was to navigate their steamship with ordinary care and skill in this public river.

The plaintiff was (as against any other wrongdoer) in possession *de facto* of the oyster bed, yet the defendants, by their servants, carelessly and unskilfully

(1) Alleyn's Rep. 10.

Charlesworth (1), and it is not open to the defendant to set up a *jus tertii*.

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Feb. 22.

LORD ASHBOURNE, C.:—

This case comes before us on appeal from Mr. Justice Johnson, presiding in the Admiralty Court, and this action is brought by Mr. Petrie, who is a Liverpool fish merchant, and

navigated their steamship, whereby they put her ashore on the oyster ground, and that breach of duty caused damage to the plaintiff's oysters. This was an actionable wrong, and therefore I think (not, as I have said, without hesitation) that the first, but in substance less material, cause of action is established by the plaintiff.

The second and more serious alleged cause of action is injury to plaintiff's oysters by negligence in moving the steamship off them after she had grounded. The position of the vessel was that she lay all day on her port side—her fore part clear of the ground for about 12 feet, resting on the stone-work of the ruined perch, her heel partly athwart the small ridge of stones, and though there was water under her port side, it was possible, as Hollywood and Quinn say, to walk round her stern, which, as well as her keel, lay on the oyster bed. In that position the evidence of Connolly and Hollywood is that this oyster bed was not much (if at all) injured, and the propeller was not broken. Ferguson, the master, had ample opportunity to consider the condition and position of the vessel, and, with deliberation, to make preparations to get her off with care and skill, and without further injury to herself or the oysters, when the flood tide should make in the evening. As I have pointed out, the ebb had run out for an hour before she went ashore. The top of the evening flood tide was 42 minutes past 5, and I am advised that, with the most ordinary mechanical skill and care, her master should have had his preparations ready, and should have waited for the highest water. She should have floated clear of the ground, and could then easily and readily have been warped or towed off without further injury to herself or to the oysters. Instead of this, the evidence even of the master is that about an hour before high water (that is, before 5 p.m.) he sent a kedge, or stream anchor, over to the Down side of the channel, with two 4½ inch manilla warps, which were brought to the steam winch; and at 5 (nearly three quarters of an hour before high water) he began to heave. The anchor gave a little, though it did not come home; but so great was the strain that one warp carried away, and was replaced by another and similar warp. The steam winch bent under the excessive strain, and as all the

(1) 4 B. & Cr. 574.

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who is connected by interest and by property, and I am sure by sympathy also, with the neighbourhood where the incident complained of occurred, against the owners of the steamship "Rostrevor" under the circumstances that have been stated before us. The claim that he puts forward is that he was possessed of an oyster-bed sufficiently marked out, being part of the fishery of the Newry River, where the tide ebbs and flows, in the county Louth, with the oysters on it, and he alleges that the defendants' ship "Rostrevor," steaming down the river, by the negligence and want of skill of the defendants, and of their servants, left the fair way and ran on the oysters and injured them, and afterwards the defendants, by their servants, so negligently and unskilfully moved the ship from the place where she grounded, that she damaged other parts of the oyster-bed and oysters. The defendants traverse all the averments, and they allege that the ship was being navigated with all reasonable care and skill, and that she was removed with reasonable care and skill, and the grounding was an inevitable accident, and there was no damage; that the river was a public navigable river, of which the bed and soil was vested in the Newry Navigation Company, and the defendants resolutely challenged, all through, Mr. Petrie's allegation that he was possessed of the *locus in quo*. The case was tried and fully and carefully heard by the learned Judge, and on the first important point, on the question of possession, it is true that he found for the plaintiff, but he expressed at the same time that he did so with hesitation and with doubt. On the other points he found for the plaintiff, and he assessed the damage in the way that is indicated, or he offered to give a

available power was required, I have no doubt (notwithstanding the denial of the master and mates) that the propeller was used, and with efficiency, to assist the warps. Quinn says he saw it plainly working in the water, and the state of the ground in the area of disturbance for 300 yards (as indicated by Mr. Meares' map), where Ashe stated the sand or gravel were all churned up together, shows the amount of efforts made to move the steamship while she was not clear of the ground, and the way she was hauled and forced off the oyster ground before she had floated, and before high water, and to account for the propeller, and the extent of the injuries to the vessel, which it is stated will

reference. The question that meets us at the threshold is this question of possession. Was Mr. Petrie in possession in the way he alleges, because on the true understanding of that question turned the starting point from which the whole case sprung. In reference to that we can turn to some points that cannot err, that do not depend in the slightest degree on the demeanour of witnesses, or the impression that their demeanour may create, and their manner of deposing to what they are proving may convey. The letters and the correspondence that we have before us are very remarkable. It is a singular correspondence to be found in a case where possession is boldly alleged on the one side, and where it is not unnaturally denied on the other. [The Lord Chancellor read the correspondence, the substance of which is stated *ante*, pp. 557, 558.]

That was a correspondence with those who are masters of the river, who plainly indicated there that they would not allow this gentleman under any circumstances, or for any purpose or object, to do anything that would in the slightest degree interfere with their desire to assist the navigation, and to attend to the interest of those who had to look to the navigation, and who had to use the navigation. On the correspondence there could not be a clearer, more distinct, more peremptory attitude taken up on the one side, and on the other side letters of a more appealing character, more asking for consideration and for generosity, but not suggesting that it was within a hundred miles of being anything, or an asking for anything, on which a vestige of a claim of right could be based. And after that came a request to the Fishery Inspectors that they would grant him a license,

cost £600 to make good. I am advised, and it is my own opinion, that this operation was, from beginning to end, characterised by imprudence, and was effected without ordinary nautical skill and care, resulting in damage to the plaintiff.

The master ought, as I have stated, to have waited until his vessel floated well clear of the ground, and the rest would have been plain and easy. My judgment is for the plaintiff, with costs, on both causes of action.

If the parties cannot agree as to the amount of damage, refer to the registrar to ascertain it.

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and this request was at once refused; so that Mr. Petrie's position at the time that he instituted these proceedings and at the time of this occurrence was this, that he had failed to get a license, undertaking, or promise, or sanction, or anything whatever of any sort or kind from those to whom he had appealed for those acknowledgments, that he was there in a way that the law would recognise. That being his position, he continued there, having made some communications with the tenants in the neighbourhood. It is not suggested that the tenants had a right to give any real legal claim. It is not claimed by him, or suggested by Mr. Justice Johnson in his judgment, that it was more than a benevolent way of appealing to their sympathy and appeasing their susceptibilities. But he continued to lay down his oysters at his own risk, at his own peril, and taking his chance. And then it appeared that this vessel, the "Rostrevor," in December, 1895, was going on a voyage to Swansea, and the case made is that the vessel, in going down the river, went across a portion of the river that was covered by these oysters, and in doing so damaged the oysters; and that that gives this gentleman a right to go against the owners of the ship, and demand as big damages as he can get against the ship. Of course, if the law gives him the right, he can appeal to the law; but, if the law gives him the right under these circumstances, it is certainly a very novel and startling state of facts that a man, whose title is thus dealt with in the correspondence, and who is refused authority in every quarter to which he has appealed, is entitled to go against the owners of a ship who, in using the river, did harm to his oysters. On the first question, then, I am of opinion that the possession is not made out; and I think that that is a very important ingredient to start with, for it must necessarily colour the way in which the whole case is to be regarded. If a man is in possession, a different class of rights and points of view, and different standards of negligence and care, will have to be applied. Being then of opinion that the plaintiff was not in possession, I think that on the facts the defendants cannot be held liable for the grounding of the ship. What occurred was this: this ship, starting on the morning of December 10th, 1895, Swansea being its destination,

going down the river, left the centre of the channel, driven by a gust or squall, and it went over this place where the oysters had been placed by this gentleman; then it very nearly got off all right, for if it did not catch in the perch at the end, there would be no question raised at all; it very nearly got off, and very nearly escaped all danger of doing any harm to the property of any human being. But it did catch in the end, and it is important that this point should be noticed that it is stated that the captain of the ship, at the time that he went there, and got caught in this place and grounded, was unaware then that there were oysters there. He knew nothing about it. He used the strong expression—whether too strong or not, it is a mere detail of evidence—that one person in a hundred did not know of it. But at all events he says that he was one that did not know of it; and that, when he went there, it was an honest piece of navigation on his part in the exigencies of being driven in by a squall; and at the time he went there he knew nothing about there being oysters to take care of, or guard against, or anything of that sort. Now, being there, he remained there for many hours. He had to wait for the tide to come again to the help of the ship. And I admit that a question of greater difficulty comes in as to what occurred when he was seeking to get away. Because it is alleged that at that time he knew of the oysters, that he had an opportunity of seeing at low water that the oysters were laid about him, and that a duty grew up from that knowledge even if it did not arise before. And the matter is to be looked at with closeness, in order to see whether that makes such a change in the position as to justify the maintenance of the action and a seeking of an account for the damage that was done. Assuming now that this gentleman was not in possession, and that the use of the river was primarily for those who had to use the river for the purpose of navigation, the question I put myself is—What was the standard of care that under those circumstances was required for a ship, that had honestly been driven there by the course of this navigation, and that was grounded there; what was the standard of care to be applied in getting off from the place where it was grounded; what was the standard of care and of caution that was

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requisite on the part of the owners of the ship towards anybody who might have laid oysters there? In my opinion it would be an entirely different standard—certainly not the same standard—to that which should be applied if the plaintiff was in lawful possession of an oyster bed, that was there legally under a perfectly legal title. The captain was entitled to get off his ship by any reasonable exercise of seamanship that his own reasonable knowledge might suggest. He was bound, I think, not to be reckless, or careless, or do unnecessary damage to the property in the oysters of anyone, but, within that, I am of opinion that he was entitled to do anything that he reasonably could to effect what was necessarily his primary object, and that was to get away his ship safely, according to his skill and judgment, exercising that skill and judgment *bona fide*, and fairly avoiding, as far as he could, any reckless, negligent, or careless action that might be detrimental or dangerous to the oysters. Now, what is suggested that he should have done on the other side? He had to get off somehow. He was there; he had to get away; and he got away, in a way that perhaps was not the very acme of perfection, a way that may be did not come up to ideal seamanship, and that, perhaps, was faulty from the point of view of a first-class seaman. But it is not suggested that there was any intention on his part to do any harm, and it would appear that he was honestly trying to do what his own skill and judgment conveyed to him, was the best way to get his ship out of the difficulty in which it was. Now, it is suggested that he might have done two things. It is suggested that he might have waited a short time for high tide. He did not begin to make preparations until an hour before high tide. He had not, I suppose, completed them, at all events, until a moderate time before high tide. The ship was afloat, and can it be said under these circumstances, having regard to the standard of duty, and the crisis and plight in which he was, that the circumstance was one, on the score of negligence, carelessness, or recklessness, to fix the ship with liability?

The other circumstance alleged is that there was no tug employed. I think I heard that argument suggested. By "towed" I suppose is meant, towed by a tug. But it is not

suggested that there was such a thing in the place. For all I know the ship might be waiting there for a long time if she had to wait for a tug. What is the standard to be applied under the circumstances towards a man in the position of the plaintiff? I do not think that the highest, or that which would commend itself to the deliberate judgment of experienced seamen who have had time to consider it as the best method—I do not think that that is the standard that would be fairly asked to be applied; but rather, what would a reasonable captain of such a ship, placed in such a plight as that, reasonably do under such circumstances, in such a place, in such a river, and in such a situation? That is the standard I apply. I do not think that Mr. Petrie had a right to ask for a higher standard under the circumstance of his *status* with reference to these oysters; and I do not find any authority suggesting anything in the slightest degree to the contrary. I am not embarrassed by anything that is to be found in the *Colchester Case* (1), or in what Lord Denman said, for I think the facts and circumstances are distinguishable. I looked at that case with great attention. I have read over also the case of *Smith* v. *London and South-Western Railway Company* (2); and I am not ashamed to say that I read it twice, because, having read it the first time, I failed to see why such insistence was placed on it, and I read it over again to see whether there was anything in any of the judgments which gave it special pertinence in the present case; but as the duty is cast on me of making up my mind on the matter, I must say that I can see nothing in the judgments to interfere with my own view in the present case, and with my acting on my own conception of the law applicable under its own special circumstances to this case. I find in the case in which Lord Hannen (3) gave the judgment so much referred to, the highest law and sense laid down with force, as everything that Lord Hannen said was laid down with. The case laid down that upon a captain placed in a difficult position by the act of a pilot, "the duty only is imposed of getting out of the position by reasonable efforts." Surely that is the highest sense. The captain was in a certain position; he had to

(1) 7 Q. B. 339. (2) L. R. 6 C. P. 14. (3) 6 Asp. Mar. Cas. 182.

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get out of it somehow. Were his efforts reasonable? "The question I have put to the Trinity Brethren is whether they can see in any of the acts mentioned anything which the captain did which it was wrong for him to do in the condition of things in which he was placed by the conduct of the pilot?" I think these are very wise words. In this case an emergency had arisen. The ship was grounded under the circumstances that had been stated; the captain had to get her afloat; and, having regard to the standard of duty cast on him by the facts and circumstances of the case, was his conduct reasonable—was it such as a fair seaman under such conditions, according to his lights, might fairly and reasonably adopt? And, if it was, I think it would be very hard under the circumstances to hold him liable. In my opinion, under all the facts and circumstances of the case, without questioning what was seen by Mr. Justice Johnson, or the conception of seamanship entertained by his assessors, but making my own deductions from the facts and correspondence as to possession, applying my own opinion as to what under the circumstances was the standard of duty applicable, I am of opinion that the judgment was erroneous, and the appeal should be allowed.

FITZ GIBBON, L.J.:—

I agree that this action is not sustainable, though I find more difficulty in arriving at this decision upon the injury done to the plaintiff's oysters in getting the "Rostrevor" off, than upon the injury caused by her running aground in the first instance. We must consider these causes of action separately—both on the facts and on the law.

To sustain the action for the injury caused in the original grounding, it appears to me to be necessary for the plaintiff to show that he was *possessed* of the place where the ship ran aground in the legal sense which would enable him to maintain an action of trespass *quare clausum fregit* against a wrong-doer. The place was the foreshore of the fair-way of the tidal approach to a port, and was covered with water at the time of the alleged trespass. It certainly was not vested as property in any sense in the plaintiff: whether vested as a piece of land in the Newry Navigation Company or not, it was within the limits of their navigation, and it

was under their control for all navigation purposes. The plaintiff had not the permissive occupation of a licensee, nor any right of user, and, as against the Company, the oysters were there wrongfully. On September 29, 1892, he was cautioned that he planted his oysters there at his peril. On September 30, 1892, he promised to have them all away in six weeks, and to lay no more there unless he could arrange with the Company to do so. On June 28, 1893, he was warned that he had broken his undertaking to lay down no more oysters on the place, and on the following day he undertook to have them all away by the end of October. On July 3, 1893, he asked for a lease of the ground for the purpose of depositing oysters there, and on July 11, 1893, he received the reply that considering the Company might require the ground for depositing dredging material, *as well as for other navigation purposes*, they could not accede to his request.

At the time of the injury therefore the oysters were at the plaintiff's peril in a place open for public navigation where he had no right whatever to place or keep them, and I cannot see that they were under any protection known to the law, except that which affects a private owner's chattels when left in a wrong place at the owner's risk. In taking this view, I am not in any sense allowing the defendant to set up a *jus tertii*. I hold that the plaintiff had no *jus* at all. It lay on him to prove sufficient possession to maintain the action, and as to the *locus in quo* he has failed.

I assume that he did not abandon his property in the oysters by placing them where he did. The only protection that I can conceive the law to give to chattels left in such a position is the natural duty of every man to cause no unnecessary damage to the property of another. The measure of the obligation is the lowest measure of care covered by the maxim "*Sic utere tuo ut alienum not lædas.*" It cannot be raised to the level of the right asserted in an action of trespass founded on possession, and it does not involve the sacrifice of the correlative natural right of using one's own property in any reasonable manner. A man lawfully using a highway, occupies the space on which he, or his horse, or his vehicle, stands or travels; but he can maintain no action of trespass against a person who invades that space. The true distinction is marked,

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as most legal distinctions can be, by the forms of action maintainable under the old scientific system of pleading, and by the distinction between trespass *quare clausum fregit*, and trespass on the case for negligence, *i.e.*, for breach of a recognisable legal duty to the person injured. In *Harper* v. *Charlesworth* (1) the sufficiency of the plaintiff's possession to enable him to maintain his possession against a wrongdoer was limited to "so long as he had the land by license from the Crown." In *Harrison* v. *Duke of Rutland* (2) the plaintiff was held to be a trespasser, not because he used the highway negligently, but because he was not using it *at all as a highway*, in going there to prevent the defendant from driving his grouse. No action of trespass on the case for negligence could, in my opinion, be maintained by the present plaintiff, unless knowledge of the existence of his oysters, or such reasonable probability of their being in the place as would make it the duty of the defendant to act as if he knew they were there, could be shown, *i.e.* unless damage to the oysters was the natural or probable consequence of running ashore. I accept the finding of the Court below that the stranding of the ship was an act of improper seamanship, and of negligence towards the shipowners, or even against the Navigation Company, if, for example, the ship had wrecked one of their beacons, but this will not give a cause of action to the plaintiff, to whom the navigators of the ship owed no duty. The plaintiff, apparently because he was conscious of the infirmity of his title, had not given any visible sign that his oysters were there, and in the absence of any reason to believe that injury to oysters was involved in the act, negligent though it was, of not keeping clear of the bottom at this place, no action will lie. At the same time, I wish to observe, as throwing some light on the way in which the case was regarded in the Court below, and upon the degree of the legal obligation of care which the Court imposed on the defendant, that I can find no evidence of extreme negligence in the stranding of the ship. She was keeping to the starboard side, her proper side of the channel, the wind was blowing on her port side, the tide was setting in the same direction; a very small miscalculation of either of these forces would account for the grounding; the vessel

(1) 4 B. & C. 574. (2) [1893] 1 Q. B. 142.

would probably have gone clear across the bank if she had not struck against the ruins of the old beacon, which stood about three feet above the normal level of the bottom; she was making for the beacon light, and, apparently, would have rounded it in safety, if she had not taken the ground before coming up to it. The deviation from the proper course was very slight. The witnesses on both sides prove that she struck the wreck of the old beacon with the bluff of her starboard bow; the oysters were planted out to a distance of not more than 16 feet, and one witness states to within 12 feet, from the edge of the bank, and the plaintiff had himself placed a ridge of stones about one foot high along the edge, which not only diminished the depth of water for the ship, but was proved also by uncontradicted evidence to have come in contact with the ship. However, I accept the finding that the ship was negligently navigated, but that only carries the case to the extent of making the captain liable to those to whom he owed a duty of some sort, and, in my opinion, in point of law he owed none to the plaintiff.

In the *Colchester Case* (1), notice to the defendant that the plaintiff's oyster-beds existed and were liable to be injured by attempting to pass over them, when the defendant's ship grounded on them, was assumed to be necessary to maintain the action.

In *Le Lievre* v. *Gould* (2), Lord Esher says, perhaps too broadly, "that a man is entitled to be as negligent as he pleases to the whole world if he owes no duty to them." The *Whitstable Case* (3) was not a case of negligence. Mr. Ronan contended that the question was—Whether the last paragraph in the head note to *Smith* v. *L. & S. W. Railway Co.* (4) was law? But in that case the injury was held, rightly or wrongly, to be the "natural consequence" of the fire which the defendants were bound to regard as likely to result from their negligence, and Channell, B., says that when it has once been determined that there is evidence of negligence, the person guilty of it is equally liable for its consequences, whether he could have foreseen them or not; and all the

(1) 7 Q. B. 339.
(2) [1893] 1 Q. B. 491.
(3) 11 H. L. Cas. 192.
(4) L. R. 6 C. P. 20.

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judgments show that the case turned on negligence which gave a cause of action for its direct consequences only.

It is no doubt a strong measure for a Court of Appeal to differ from the conclusion of a Court below, aided by an expert assessor, upon a question of negligence. I admit that after the vessel had grounded, and after the Captain had become aware that the plaintiff's oysters were under his vessel, the action for the injury in bringing the vessel off must be treated upon entirely different grounds, but the measure of the duty due to the plaintiff under such circumstances depends on a question of law, and it rests upon the plaintiff to give affirmative evidence of a breach of that duty, otherwise in point of law he is not entitled to maintain his action. Not only the English Court of Appeal in *The Bywell Castle* (1), but the House of Lords—in the Irish cases of *The Toiler; Spaight* v. *Tedcastle* (2), and *The Duke of Leinster* (3)—reversed the decision of the Court of Admiralty aided by assessors, as to the measure and degree of skill and care to be shown under circumstances of difficulty. No doubt those were cases in which the defendants were placed in difficulty in the first instance through no fault of their own; but I reject, as contrary to law, and to the *dictum* of Lord Esher in *Le Lievre* v. *Gould* (4), Mr. Ronan's contention that a person who has been guilty of an act which is negligent as against one individual, say his own employer, thereby becomes a wrong-doer *ab initio* as against all the world, and is answerable to everybody for every injury that happens in consequence of his act. This principle, in my view, would be necessary to sustain the cause of action for the original grounding; but we have now to see how far its application is modified with respect to the injury done in removing the ship, when knowledge of the existence of the oysters imposed some duty towards their owner upon the master of the ship. We must consider, as matter of law, what were the rights which the captain was entitled to exercise in floating his ship, and what was the measure of the care which he was bound to use towards the plaintiff's oysters in that operation? He was entitled to use all reasonable means, according to the best of his judgment, to take his ship out of the position in which she

(1) 4 P. D. 219.
(2) 6 App. Cas. 217.
(3) 20 Ir. L. T. R. 58.
(4) [1893] 1 Q. B. 491.

lay, and though he was bound to the plaintiff, in using those means, not to recklessly or wilfully injure the oysters, his first duty and right was to do everything which seemed reasonable to get his own ship off. I have read the evidence with great care, and I find no sufficient evidence of any reckless conduct or of such gross negligence as ought to charge him with liability to the plaintiff. The alleged negligence was the use of the propeller in taking his ship off. It is proved that additional damage was done to the oysters in removing the ship, but some such damage was inevitable, and if the inquiry had been limited to ascertaining how much damage, in moneys numbered, was done by turning the propeller, over and above what would have been done if the ship had been dragged off by the warps and winch, it would have been a very nice problem. But what is the evidence? The only oral evidence that the propeller was used was given by Patrick Quinn in these words:—"The propeller was used *going off* and going on: saw the propeller working when she was going off, heard the splashing of the water." He does not fix the stage at which it was used, but the splashing proves that it turned, and the shape of the space "churned up" shows that the ship was moving at the time, while the deep hole made in going on shows that a good deal of the "churning" must have been done then. Meares describes the place where the oysters were "churned up" as "apparently *where she was trying to get off.*" It is deposed that the corners of the four-bladed propeller were chipped at the points in going on, further proving that a good deal of the churning was done then, and though two blades were found broken on the survey, we cannot speculate whether they were not injured in going on also. But I assume that there is evidence sufficient to show that the propeller was put in motion before or at the moment when the bow of the ship was cleared of the ground. Its having turned goes to show that the stern was clear, or nearly so. Having regard to the assessor's advice, and to the judgment of the Court below, I assume further that the propeller ought not to have been set in motion so soon, and I give the plaintiff whatever benefit he is entitled to from the captain's denial that he used it until the stern of the ship was in the channel. But this cannot do more than make his evidence untrue, and having regard to his admissions about the log, I even

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treat him as an untrustworthy witness. The defendant is not to be made liable, unless the plaintiff's evidence shows that the oysters were injured by an actionable misfeazance, or by breach of the duty due to their owner, arising from mere notice that they were there, in a place where they ought not to have been.

I cannot think that the statement of the learned Judge of what the master could or ought to have done is supported by the evidence. He says—"He should have had his preparations ready, and *have waited for the highest water*, when (as the steamship had made no water) *she would have floated clear of the ground*, and could then easily and readily have been warped or towed off, without further injury to herself or to the oysters." There is no evidence that a tug was available, nor, if available, can I find any legal duty on the part of the master to employ such a tug, if the ship could be got off with her own appliances. Towing, therefore, is out of the case. But I am further of opinion that there is no evidence to sustain the statement that the captain did not wait for what was practically "the highest water," and it is disproved that the ship would at any time have "floated clear of the ground," or would at any time have been "easily and readily warped off." The time of high water was within a minute or two of 5.42 p.m. In a narrow tideway such as this no general formula as to the tide could apply, and it required evidence to show how much, if at all, higher the water would rise in the last half hour of the flood, at the point where the ship lay. She had grounded as nearly as possible an hour after the time of high water in the morning. Here again, we don't know how the rise in the last hour of flood compares with the fall in the last hour of ebb. In the absence of evidence, it seems reasonable to assume that an hour before high water—say at 4.45—the water was at about the same height as when she grounded. She had grounded on the ruins of the perch standing between three and four feet over the mud, and lay on the plaintiff's ridge of stones, one foot high. The plaintiff's witnesses prove that, although she did not stick fast until she reached the perch, she ploughed a track in the bank for a considerable distance before she stopped, and as she lay, her keel was to some extent embedded in the mud and stones. She was stuck fast by the bow, her propeller blades were chipped, and the operation of trying to

get her off would necessarily occupy a considerable time, and require considerable force. In my opinion it certainly was not the duty of the captain to do nothing until the time of "the highest water." If he had waited until then, he would have had to work for an unknown time in a falling tide, when every minute might have been the last at which it would be possible to move his ship. At least this could not have been his duty unless, as a reasonable man bound to do his best for his ship, he ought to have known that she would "float clear of the ground" by 5.42 p.m. The undisputed facts appear to me to disprove this assumption of the learned Judge. The *only evidence* given for the plaintiff as to the time at which she came off was that of Quinn, who says "she did most damage coming off *a little before high water.*" The master says—"I ran out a kedge *about an hour before high water.* I began to heave on the kedge about 5. The warp was manilla, $4\frac{1}{2}$-inch, two warps. There was a strong tide and a heavy strain on, and I used the steam winch *when afloat.* Her bow was on the old perch, and the rest of her lying on the stone wall and on rocks." The first mate, Dunne, says—"We hove in by the steam winch, *when she began to float forward.* One warp burst, the other held. We had to bend on another in the place of the one which burst. When the first burst the second mate and I took out the second warp in the ship's boat." The only witness who gives the hour says—"She was got off at 5.30," and this hour is given in the log, which is not contradicted upon this point. M'Coy, the second mate, says—"We put out a stream anchor, *when we commenced to heave on the winch.* The anchor came home a small piece." The winch was strained in getting the ship off, and I believe it was stated that the anchor also was strained. Upon this evidence I find no reason to suppose that the ship was moved at all, until within less than half an hour of high water, or that she was got clear of the ground until within from 10 to 15 minutes before that time. There is no evidence that the level of the water would differ materially during the last quarter of an hour of flood, and I am satisfied that the ship was not got clear of the ground until practically "the highest water" had been reached. But how was she got off then? By main force, and with such difficulty that I certainly cannot regard any power that was employed, even the use of the propeller,

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as so recklessly or improperly used as to render the owners responsible to the owner of the oysters—which were there "at his peril"—for its use. The way the ship was fast upon the ground, and the force which broke the 4½-inch warp, strained the winch, and made the anchor yield, prove that even at the highest water the vessel would not have floated clear of the ground. If she was clear of the ground she would have come off, and the measure of the extent to which she was stuck fast forward is to be found in the force which was used in pulling her aft. Even disbelieving the captain, and imputing to him that he gave some untrue evidence to shield his own conduct, I cannot find for the plaintiff unless he has proved his case. If Quinn is right, that the propeller was used, it was certainly working when it was used, for it splashed up the water, and the track it made in churning up the bottom shows that it was used as the ship came off, and therefore it must have helped to bring her off when every other force was strained to the utmost. I cannot sustain a verdict against the defendants, unless I hold that after the warp had broken, and after the anchor had yielded, and after the winch had been strained, it was actionably wrong to use the propeller, in the words of Meares, "apparently where she was trying to get off," and in the words of Quinn, "when she was going off," "a little before high water." The evidence is, in my opinion, insufficient to establish the issue which lay upon the plaintiff of showing that, in using the propeller, the master was guilty of an actionable breach of the duty which he owed to the plaintiff's oysters, which had no business to be where they were, as distinguished from reasonably trying to get his ship off. Legal liability is to be attached, not by the professional opinion of an expert, who was not there, as to what he would have done, but by showing that the master did something more than he could justify as a man who owed the duty to his employers of doing the best he could, under the circumstances, and according to his judgment, to extricate his ship from the position in which his own want of seamanship had placed her.

The *Romney Marsh Case* (1) is an authority for the proposition that the master's duty to the plaintiff did not oblige him to sacrifice his vessel to the plaintiff's interests, even though his own neg-

(1) L. R. 5 Ex. 204.

ligence was the remote cause, or *causa sine qua non*, of the injury to the plaintiff. In that case the defendants were held liable only because the injury to the plaintiff's sea-wall was held to be the immediate effect of the defendant's negligence. The judgment of Lord Hannen in *The Octavia Stella* (1), and the question which he put to the Trinity Masters in that case, are directly in point here. He said—"If the vessel had taken the ground in the ordinary course of navigation from some accident, it might be that the pilot would not be liable for the consequences of his act, because undoubtedly the river is a high road, a highway; and I assume if, in the ordinary course of navigation, the vessel could not get up in one tide, and anchored and grounded, there would be no negligence. But in this case we must have regard to the fact that the captain, by no negligence of his own, but by the negligence of somebody else for whose acts he was not responsible, was brought into this position, and he therefore had only the duty imposed upon him of getting out of that position by reasonable efforts. His duty was to extricate himself from the position in which he was by the ordinary means of navigation, and he was not bound to take extraordinary measures not in the nature of ordinary navigation, but in the nature of extra exertions, for the purpose of preventing the damage to the oysters. Therefore the question I have put to the Trinity Brethren is, whether they can see in any of the acts mentioned anything which the captain did which it was wrong for him to do in the condition of things in which he was placed by the conduct of the pilot?"

One expression in the captain's evidence has been pressed against him to an extent which in my opinion is not warranted. He swore that the ship was "afloat" when he attempted to get her off, and this was used against him as an admission that she "floated clear of the ground." The facts prove that he could not have meant that. Had she been clear of the ground the warp, winch, and anchor could not have been strained as they were, and the propeller could not have been broken. If she had been clear of the ground, the propeller could not have ploughed it up. The captain evidently meant the same thing as the first mate, Dunne, who says—"We hove in by the winch when she *began to float forward*. It was

(1) 6 Asp. Mar. Cas. 182.

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then that the warp burst." After that the two mates took out the second warp in the ship's boat, and bent it on. It is not suggested that the propeller was used until after that, and I have already shown that the use of the propeller was while the ship was coming off, within a few minutes (certainly less than a quarter of an hour) of the time of high tide.

In all this I can find no evidence sufficient to charge the captain with anything more than an error of judgment as to the best means of getting his ship off; and, speaking for myself, I think the evidence shows that no more force was used than was actually necessary to attain that object, and that the operation was not begun too soon. The evidence, therefore, fails, in my opinion, to support the action for negligence, and it must be dismissed with costs in the Court below and here.

I must add, in conclusion, that the opposite result would, in my opinion, impose liability not warranted by law upon persons entitled to rights of navigation in an important public water-way, in favour of a person whose property was placed by himself, at his own peril, in a place where it ought not to have been.

HOLMES, L. J.:—

The Newry river between Newry and Warrenpoint forms part of the Newry Canal and Navigation now vested in the Newry Navigation Company, by virtue of a local and personal statute, 10 Geo. 4, c. cxxvi. s. 3, and of an order of the Lord Lieutenant of Ireland, dated the 12th of July, 1830. During the argument it was questioned whether such an order had been made; but I have found it recited in the preamble of the Newry Navigation Act, 1884 (47 & 48 Vict. c. cxliii.), and the fact cannot be doubted in the face of this legislative declaration.

Ample powers have been by these and other statutes conferred upon the Company to enable it to maintain the navigation; and by the 110th section of the first quoted Act, it is provided that every person shall have free liberty with boats, barges, and other vessels, to navigate, pass upon, and use the navigation upon payment of certain tolls, and subject to certain rules, orders, bye-laws, and regulations.

On the morning of the 10th December, 1895, the Master

of the ss. "Rostrevor," having duly paid his tolls, was with his vessel navigating, passing upon, and using a part of the Newry river near the old castle at Narrow Water, where the stream is neither broad nor deep. He apparently had the river to himself; but coming to a bend where there was a bad view ahead, he kept to the south or starboard side for the purpose, as he says, of being able to pass with greater facility any approaching vessel. This deviation from the usual course brought him into shallow water. The vessel took the ground; and although according to the Master's account the engines were reversed at once, she forged ahead until she stopped with the bluff of her starboard bow on the stone ruins of a submerged perch.

I have no doubt the Admiralty Judge and his nautical assessors were right in holding that the master was guilty of bad seamanship, and that he has himself to blame for his vessel taking the ground. If he had injured any person to whom he owed a duty—if, for example, he had carried away one of the beacons belonging to the Navigation Company, or if he had been the cause of damage to another vessel following or meeting him—he ought to have been liable for his negligence. But no question of this kind arises. Vessels go aground every day in shallow channels and get afloat as best they can, and nothing is heard about it. The bottom of the sea or river does not suffer; and the only persons to complain are the owners, if there is a bill for repairs or the voyage is delayed. This is what would have happened in the present case, were it not for what Mr. Justice Johnson called the "energy" of the plaintiff—an energy which, so far as I can see, displayed itself chiefly in persistently trespassing upon another's property, and a total disregard of legal right and duty. This energy took the direction of oysters; and the plaintiff evidently thought that it would be a good opening for his capital, if he could convert part of the waterway, which Parliament had vested in the Newry Navigation Company for the purpose of promoting public traffic, into an oyster-bed for his private profit.

He applied to the Fishery Inspectors for a license, which was of course refused. A public department is often a sad foe to the energetic capitalist by reason of its pedantic prejudice in favour of the statute and common law. Mr. Petrie

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did not mind that in the least. He planted his oysters as vigorously as if the place had been his own. The Navigation Company sent him an immediate caution telling him that he was acting at his peril. He submitted at once—in words; but went on as if nothing had occurred. The following year he was reminded of his assurance that he would lay down no more oysters, and was told that he had violated his undertaking; and a fresh warning was given. This called forth an expression of sad surprise, accompanied however with another promise that the oysters would be soon all removed. A little later, he applied with touching simplicity for a lease of the ground, to which he received the only possible reply—a refusal accompanied with a statement that the place was required for navigation purposes. I need hardly say that all this was no rebuff to capital and energy. The oyster culture went on as before, and I presume yielded a modest profit; but everything comes to him that waits. The typhoid microbe has in recent years tended to make the oyster market somewhat uncertain; but on that December morning when the "Rostrevor" under the guidance of its easy-going and somewhat lubberly master took the ground, there at once arose a prospect of quick returns with no greater risk than a paltry law-suit. It is true that the master knew nothing of Petrie or his oysters. He had neither knowledge, nor the means of knowledge; he had never heard of them, and there was neither water-mark nor land-mark to indicate their whereabouts. It is therefore hard to see how the question of duty and negligence arises; but this difficulty is got over by making the master a trespasser. Petrie, by placing the oysters on the foreshore has become possessed of it *de facto*, and is consequently in legal possession as against all the world except its true owner. Any mariner who allows his boat to touch the bottom is *prima facie* a wrong-doer, and unless he can justify by showing that it was an inevitable accident, he must pay damages more or less. Now the principle of law that makes possession without title sufficient to maintain an action of trespass is well understood; but it is unnecessary to discuss it in detail, as it has no application to the present case. Petrie had no possession against the Newry Navigation Company; and as that Company is merely a trustee of the river for the benefit of ship-owners who are entitled to use it

on the payment of the prescribed tolls, he had no greater possession against the owners of the "Rostrevor" who had their vessel there, not as bare licensees, but as having a license coupled with an interest. No doubt if the master knew of the oyster-bed, he would not have been justified in injuring it through recklessness or carelessness. There is a degree of care due to both the person and property of a trespasser. If a neighbouring poultry-farmer insists in spite of my remonstrances in placing his hens' eggs along the sides of my avenue, leaving ample room for a vehicle to pass along the centre of the way, my guest and licensee would not be justified in driving over them in daylight, but he could not be sued in trespass, if, not knowing they were there, he drove over them in the dark. For these reasons I am of opinion that the defendants are not answerable for the consequences of the vessel taking the ground.

It is, however, strongly argued that they are responsible for the injuries caused in getting it off. Lord Justice Fitz-Gibbon has analysed the evidence and findings on this subject with a practical skill and knowledge which I do not possess. What he has said is convincing to my mind; but I should be sorry to differ from the Admiralty Judge and his nautical assessors on any matter of seamanship, and I say distinctly that I do not do so. I differ from them in their estimate of the standard of care required in the circumstances of this case. If a gentleman when driving a mail phæton through a street by some act of negligence on his part suddenly finds the horse and vehicle inside a china warehouse, it becomes his duty to exhaust every expedient to get them out without injury to the brittle ware. In such a case, the goods in the warehouse must be his first consideration to which regard for the horse and trap is to be subordinate. But the master of the "Rostrevor" was entitled to get his ship afloat in any reasonable way. He was under no obligation by reason of the oysters to incur greater expense, or to adopt a higher standard of precaution than if he had gone ashore at a place which an energetic trespasser had not converted into a source of private profit. In getting her afloat, however, he was not at liberty by recklessness or negligence to injure the oysters. Under the circumstances, I cannot regard it as negligence that he made his preparations to leave and

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commenced his operations for moving the ship a little before high tide, or that he assisted her to motion by the action of the propeller. He was naturally apprehensive that otherwise he might lose the tide altogether. He certainly was not bound to employ a tug, even if there was one available, of which there is no evidence. But beyond these matters, I find no suggestion of negligence. For these reasons I think that the judgment ought to be reversed.

Solicitor for the plaintiff: *J. F. Small.*
Solicitor for the defendants: *Hunter Moore.*

R. D. M.

Land Com. 1898. Jan. 18, 21. *Appeal.* May 4.

CLARK, TENANT; TAYLOR, LANDLORD (1).

Landlord and tenant—Notice by tenant of intention to sell tenancy—Offer by landlord of sum for purchase "without prejudice"—Non-acceptance by tenant—Disagreement—Application to Court to fix true value—Land Law (Ireland) Act, 1881 (44 & 45 *Vict. c.* 49), *s.* 1 (3)—*Rules* (*January* 2, 1897), 98, 99.

A tenant having served notice of his intention to sell his tenancy, the landlord on the sixth day following, wrote offering a sum for same, adding, "which I hope you will consider fair, and treat without prejudice." No reply was made to that offer, and six days later the landlord served an originating notice to ascertain the true value of the tenancy:—

Held, by the Land Commission that the non-acceptance by the tenant of the landlord's offer constituted a disagreement within the meaning of section 1, sub-section 3 of the Land Law (Ireland) Act, 1881 (44 & 45 Vict. c. 49), and that the landlord was entitled to have the true value of the tenancy ascertained under that sub-section.

The decision of the Land Commission affirmed by the Court of Appeal.

MOTION by the tenants, John Clark and Rev. Hugh Farrelly, that two originating notices to ascertain the true value of the tenancy, served by the landlord, Captain E. R. Taylor, and dated the 17th and 28th December, 1897, respectively, should be dismissed.

(1) Before MEREDITH, J., and FITZGERALD, Q.C., Commissioner.

An affidavit of John Clark stated:—The applicants were executors and trustees of Jane E. Fulham, deceased, who had been tenant from year to year of a farm known as Trubly and Bective, and had by her will directed same to be sold. On the 26th October, 1897, the fair rent was fixed at £260 5*s.*: a notice by the tenants of their intention to sell the tenancy was on the 16th December, 1897, served on the landlord's agent, Colonel Henry Stewart Johnston: on the 17th December deponent received a notice of that date, and in Form No. 2 (Rules, January 2, 1897) of application to the Court to ascertain the true value of the tenancy, and on the 28th December a second notice to the same effect. No offer for purchase had been made to the deponent or his co-executor and trustee save a letter of the 22nd December written by the said agent "without prejudice," which deponent was unable to use, and did not reply to or communicate to his co-tenant, nor had any disagreement arisen as to the terms of purchase entitling the landlord to elect to purchase under section 1 of the Act of 1881, or to apply to the Court to ascertain the true value. Before the time limited for the making of an offer had expired, and after the receipt of the notice of 28th December, deponent informed Colonel Johnston and his solicitor personally, and on another occasion before such expiration the assistant of such solicitor, that he could not accept as valid for the purposes of the Land Acts a letter written "without prejudice," and would oppose their relying on same as an offer entitling them to contend that disagreement as to price existed to found an application to fix the true value, but no other offer was made (1).

An affidavit of the agent, Colonel Henry Stewart Johnston, stated:—Having been informed that the tenants intended to sell their holding, he received instructions and authority from Captain Taylor to take the necessary steps to exercise the landlord's right of pre-emption; and prior to the letter of the 22nd December he had a conversation with John Clark relative to the holding, and

(1) Land Law (Ireland) Act, 1881 (44 & 45 Vict. c. 49), sect. 1, sub-sect. 3, is as follows:—"On receiving such notice, the landlord may purchase the tenancy for such sums as may be agreed upon, or in the event of disagreement may be ascertained by the Court to be the true value thereof."

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stated that the landlord wished to purchase it in the event of its being offered for sale. Having received the notice of intention to sell he, on the 22nd December, wrote a letter to John Clark as follows:—"I am anxious to settle about Trubly lands, late Miss Fulham's, and to save expense, I offer on Captain Taylor's behalf the sum of £1200, which I hope you will consider fair and treat without prejudice," and brought said letter to Mr. Clark's office, and being unable to see him left it with his assistant in the office, he being out, as deponent was informed. The offer contained in the letter was made *bona fide* and in the belief that same would be a fair price for the purchase of the holding by the landlord, but he made the offer without prejudice, as the Court might fix the true value at a lesser sum. Not having received any reply to the letter, or any communication from the tenants, the notice of the 28th December was served. Deponent had an interview with Mr. Clark on the 30th December, when he again offered to purchase at £1200, on behalf of the landlord, and he was still willing to do so.

T. M. Healy, in support of the application.

F. P. Hamilton, for the landlord.

Jan. 21.

MEREDITH, J.:—

In this case an application was made to us on behalf of the tenants for an order that two originating notices served by the landlord to ascertain the true value of the tenancy with a view to purchase, which notices were dated respectively the 17th and 28th December, be dismissed with costs.

The facts are stated in the affidavit of Mr. John Clark, who is one of the tenants, and who is solicitor for himself and his co-trustee, the tenants being the executors and trustees of the will of the late Jane E. Fulham. On the 15th December, 1897, Mr. Clark and his co-trustee prepared, and on the 16th December served upon the landlord, a notice according to the prescribed form, of intention to sell their tenancy. On the 17th December, and before any communication had been made from the landlord to the tenants, an originating notice in Form No. 2, seeking to have the true value of the tenancy ascertained, was served by Mr.

Thomas Ormsby as solicitor for the landlord, Captain Taylor, upon Mr. Clark. On the 22nd December, Mr. Henry Stewart Johnston, land agent to the landlord, wrote to Mr. Clark. [His Lordship read the letter of that date.] That letter was taken by Mr. Johnston to Mr. Clark's office, with the intention of delivering it to him in person. Mr. Clark was not there, and the letter was left with an assistant in his office.

On the 28th December the landlord served a second originating notice to ascertain the true value, in identical terms with the first. Mr. Clark states that no offer for purchase had been made to him or to his co-executor and trustee of any description, save the letter of the 22nd December, "which," he adds, "I was unable to use, and did not reply to or communicate to my co-tenant, nor had any disagreement arisen as to the terms of the purchase which entitled the landlord to elect to purchase under clause 1 of the Act, or to apply to the Court to ascertain the value of the holding." He further says that before the time limited for making an offer had expired, and after the receipt of the notice of the 28th December, he informed Mr. Johnston and his solicitor that he could not accept as valid for the purpose of the Land Acts a letter written "without prejudice," and would oppose their relying on the same as an offer entitling them to contend that disagreement as to price existed, so as to found an application to fix the true value. It is not necessary to refer to Mr. Johnston's affidavit further than to say that in paragraph 4 he states that the offer of £1200 contained in the letter of the 22nd December was made by him *bona fide*, and in the belief that same would be a fair price for the purchase of the holding by the landlord, but he made the offer without prejudice, as the Court might fix the true value at a lesser sum.

In this state of facts Mr. Healy, for the tenants, contended that there was no disagreement between landlord and tenant as to the price of the holding, and that such disagreement was a condition precedent to the service of an originating notice to fix the true value of the tenancy. He further contended that the object of the statutory provision was to compel the landlord to make a *bona fide* offer of a definite sum, which the tenant could rely on and discuss in open Court, and that if no such offer were made, there was no jurisdiction to fix the true value.

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The question turns on sect. 1 of the Act of 1881, and the rules thereunder. It is a curious circumstance that there is no reported decision on this important question, although we have been referred to several unreported cases in which orders have been made dismissing applications to fix the true value, on the ground that there had been no disagreement between landlord and tenant. The orders, however, merely state the result and not the grounds of the decision. Turning then to sect. 1, sub-sect. (3), I find it is enacted as follows:—[His Lordship read the sub-section]. The right thus conferred on the landlord is an important one. It is "the landlord's right of pre-emption" referred to in sect. 20, sub-sect. 3 of the Act, and it is to be observed that there is no reference in sub-sect. 3 of sect. 1 to prescribed period, or prescribed notice, or prescribed manner, as there is in other parts of the Act, for instance in sub-sect. 6 of the same section. The words are "or in the event of disagreement may be ascertained by the Court to be the true value thereof." The phrase "in the event of disagreement" is an elastic one; but the Court has jurisdiction only in that event. The Land Commission, in exercise of the powers conferred on them by sect. 50 have made rules, and numbers 99 and 100 (Rules, Jan. 2nd, 1897) apply to this matter. [His Lordship read these rules.] Rule 100 is not unimportant. It gives the alternative to the landlord of agreeing or applying to the Court, but the Form (No. 2) commences, "Having received notice . . . and having disagreed with you. . . ." Now having regard to the section and the rules, we are of opinion that it is necessary before service of the originating notice that some attempt should be made to arrive at an agreement. But the nature and extent of the attempt, and the nature of the disagreement must vary widely in different cases. There is no obligation imposed by the statute or rules to make any offer in writing, there is not even a definite statement as to the offer being made by the landlord—it might come from the tenant. The question of disagreement or no disagreement within the meaning of the Act and rules accordingly seems to us to resolve itself into a question of fact, depending upon the circumstances of each particular case, and the point to be determined in the present case is, whether in fact there was a disagreement as to the terms of purchase before the originating

notice. With regard to the first of the notices, it is perfectly plain that there was no attempt at an agreement of any kind, and that the originating notice was premature and must be dismissed. With regard to the second, the strength of the argument of Mr. Healy lay in the words "without prejudice," and we have considered whether the use of these words prevents what would otherwise be a disagreement from being such. The effect of the words "without prejudice" was considered in the case of *Walker* v. *Wilsher* (1), and Lindley, L.J., there (p. 337) defines their meaning. The question arose with regard to costs, and it was decided that letters written "without prejudice" could not be taken into consideration in determining whether there was good cause for depriving the plaintiff of costs. Lindley, L.J., says (p. 337):—"What is the meaning of the words 'without prejudice'? I think they mean without prejudice to the position of the writer of the letter, if the terms he proposes are not accepted. If the terms proposed in the letter are accepted a complete contract is established, and the letter, although written without prejudice, operates to alter the old state of things, and to establish a new one. A contract is constituted in respect of which relief by way of damages or specific performance would be given." Further on (p. 338) he says:—"No doubt there are cases where letters written without prejudice may be taken into consideration, as was done the other day in a case in which a question of laches was raised. The fact that such letters have been written, and the dates at which they were written, may be regarded, and in so doing the rule to which I have adverted would not be infringed." Well, applying these observations to the facts of the present case, it appears that the landlord, by letter of the 22nd of December, 1897, made an offer to the tenants, before the service of the notice of the 28th of December, to purchase the tenancy at a price of £1200. It was open to the tenants to accept that offer, and to compel the landlord to pay that price. That offer was not in fact accepted; and in our opinion the offer and its non-acceptance constituted a disagreement within the meaning of the Act. We cannot, therefore, set aside the second originating notice. Having regard to the fact that the

(1) 23 Q. B. D. 335.

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landlord succeeded as to one notice, and the tenants as to the other, there will be no rule as to costs.

D. M'C. M.

Appeal. May 4.

The tenants appealed.

M. V. Kehoe, Q. C., for the appellants.

F. P. Hamilton, for the respondent.

THE COURT (Fitz Gibbon, Walker, and Holmes, L.JJ.) dismissed the appeal, without calling upon counsel for the respondent.

Solicitor for the tenants: *John Clark.*
Solicitor for the landlord: *Thomas Ormsby.*

R. D. M.

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Oct. 27, 28. Nov. 11.

Appeal. 1898.

Jan. 21, 24, 28.

REG. (METGE) *v.* THE CHAIRMAN AND JUSTICES OF CO. MEATH (1).

Tithe rentcharge—Variation—"Average price of corn," omission to publish in Dublin Gazette—Certiorari—1 *&* 2 *Vict. c.* 109, *s.* 32.

The *Dublin Gazette* having ceased to publish the average prices of corn since September 1, 1887:—

Held, by Sir P. O'Brien, L.C.J., and Palles, C.B. (*diss.* O'Brien and Johnson, JJ.), and, on appeal, by the Court of Appeal, that Justices at Quarter Sessions are without jurisdiction to vary tithe rentcharge.

CERTIORARI. Application to bring up and quash an order of the Chairman and Justices of the county Meath, made at Kells Quarter Sessions on November 20, 1896, varying a tithe rentcharge (in lieu of tithe composition), in the parish of Athlumney, on the ground, *inter alia*, that the same was made without jurisdiction, the advertisements in the *Dublin Gazette* referred to in the said order

(1) Before SIR PETER O'BRIEN, L.C.J., PALLES, C.B., and JOHNSON and O'BRIEN, JJ.

not having published the average price of wheat—the particular species of corn stated in the certificate of composition—for the period of seven years preceding the date of application.

It was admitted that the column headed "average price" in the form of advertisement adopted by the *Dublin Gazette*, had not been filled up since September 1, 1887, and that the advertisement only stated the *maximum* and *minimum* prices.

The case had been at argument on the 11th and 12th June, 1897, before Sir P. O'Brien, L.C.J., and Holmes and Madden, JJ. By direction of the Court, it was now listed for re-argument.

Ronan, Q.C., and *A. C. Meredith*, for the applicant.

Matheson, Q.C., and *Chaytor*, *contra*.

The arguments appear sufficiently from the judgments.

Cur. adv. vult.

JOHNSON, J:—

Nov. 11.

This is a motion on behalf of the lay impropriator of the parish of Athlumney, in the county of Meath, to make absolute a conditional order for a writ of *certiorari* to bring up and quash an order of the Justices, dated the 20th November, 1896, varying and reducing the tithe rentcharge of the parish. The order of the Justices is impugned upon two grounds, first, that, in the present state of the law, it is not possible for the Justices to comply with the requirements of the Tithe Rentcharge Act (1 & 2 Vict. c. 109), section 32, to ascertain the average price of wheat (the species of corn stated in the certificate of composition), from the *Dublin Gazette*; and, secondly, that the order of the Justices was not made between the 1st of May and the 1st of November, and was wrong in directing the varied rentcharge to be payable from and after the 1st of May, 1897.

Both these objections were taken and urged before the Justices, but were overruled.

The composition in lieu of tithes, in the parish of Athlumney, was effected under the 2 & 3 Wm. 4, c. 119 (Stanley's Act, 1832); and the certificate of the composition, which is dated the 27th November, 1833, certified that the average price of wheat (the corn

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principally grown in the county of Meath), for seven years preceding the 1st of November, 1830, was £1 12*s.* 10½*d.*, which, throughout the argument, has been taken to mean £1 12*s.* 10½*d.* per barrel. The 2 & 3 Wm. 4, c. 119, section 6, provided that the composition should *endure for ever*, or until dealt with by Parliament, "but subject nevertheless to such variation from time to time *for ever* hereafter in the amount of such compositions, as hereinafter mentioned." This section then provides that, in such a case as the present, the period of variation shall be septennial between the 1st of May and the 1st of November, when the amount of the composition "shall . . . be increased or diminished with reference to the average price of corn *as advertised in the Dublin Gazette, during the seven years immediately preceding, and not otherwise*, and that such increase or diminution shall be applied for and effected in all respects *in the same manner* as is prescribed in the said recited Acts"—4 Geo. 4, c. 99 (Goulburn's Act), 5 Geo. 4, c. 63; 7 & 8 Geo. 4, c. 60; of which the principal Act is the 4 Geo. 4, c. 99—"except in so far as respects" the septennial period, "and except in so far as relates to the calculation of such increase or diminution in reference to the average price of wheat or oats within the same county." Therefore, while the Legislature, in favour of recipients of the composition, made it to endure for ever, subject to be dealt with by Parliament, and subject to septennial variation in their favour, if the price of corn increased—at the same time, in favour of those charged with its payment, the Legislature made the composition septennially variable for ever, as the price of corn fell, the variation in either case to be according to a fixed standard, viz. "the average price of corn, as advertised in the *Dublin Gazette*, during the seven years immediately preceding and not otherwise." This variation therefore was to be applied for, and effected in the same manner as prescribed by the former Acts.

Goulburn's Act (4 Geo. 4, c. 99), which first established composition in lieu of tithes, provided by s. 43 that the amount of the composition should be liable to variation according as the average price of a barrel of good marketable wheat or oats (as the case might be), in the county, for the preceding three years, exceeded or fell short, by one-tenth, of the price per barrel in the certificate of compo-

sition. This the Justices, at or at any adjournment of the Quarter Sessions at which the application was made, were to ascertain, or they might appoint an arbitrator to do so, "and such arbitrator is hereby authorised and required from the *Dublin Gazette* to ascertain the price of a barrel of good marketable wheat or oats upon the average of such term of three years preceding," and to state and set forth such average price by his report in writing. In practice this system was obviously exposed to want of uniformity, and to different results in the average prices thus ascertained in different counties, and even at different sittings of the Quarter Sessions of the same county.

The 5 Geo. 4, c. 63 (1824), by s. 23, provided that compositions for tithes by agreement within that Act "shall not be subject to be increased or diminished except in the seventh or fourteenth years, and then *only with reference to the average price of corn as advertised in the Dublin Gazette* during the seven years immediately preceding," and emphasised this by providing, in s. 24, that for the purpose of variation under the 4 Geo. 4, c. 99, or that Act, "reference shall not be had to the price of corn within the county in which the parish shall be situate, *but only to the price of corn as advertised in the Dublin Gazette.*" The Legislature, in fixing the standard, established uniformity in the proceeding for variation by making the increase or diminution of the amount of the composition depend solely on comparison of the average price in the certificate of composition with the average price "as advertised in the *Dublin Gazette* and not otherwise."

In 1838, by the 1 & 2 Vict. c. 109, the Legislature established compositions for tithes in Ireland, and substituted a tithe rentcharge of three-quarters of the amount of the composition payable by the owner of the first estate (or that which the statute defined to be equivalent to the first estate) of inheritance in the land charged with the rentcharge; and by section 32, reciting that compositions for tithes abolished by the Act were liable to variation from time to time, "with reference to the average price of corn *as advertised in the Dublin Gazette during the preceding seven years*, and it is just that the said rentcharges which will become payable in lieu of such compositions, and the amount whereof is regulated thereby, should be subject to

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a similar variation," the section proceeds to make these rentcharges septennially variable as the composition had been, with like notice of application, and the like proceedings as authorised and directed by the previous Acts for establishing compositions for tithes; and provided that when the certificate of composition stated (as in the present case) the particular species of corn, the Justices to whom such application may be made, "*shall ascertain the average price of that particular species of corn from the said Gazette.*"

This is the present state of the law on the subject, and thus the exclusive standard with which tithe rentcharge is to be compared for the purpose of variation from time to time whenever the application is made, is *the average price of corn as advertised in the Dublin Gazette* during the preceding seven years.

Counsel for the now prosecutor referred to several statutes passed by the Irish Parliament in the reigns of George 2 and George 3 (for regulating export bounties on corn and the assize of bread), requiring returns of the average prices of different descriptions of grain, flour, and meal, to be made to public officials and published in the *Dublin Gazette*, and argued that "the average price as published in the *Dublin Gazette*," which was contemplated by the Legislature in Goulburn's Act, and carried into Stanley's Act and the Tithe Rentcharge Act, was such publication only as complies with the provisions of those Irish statutes, and that, when the *Gazette* publication did not comply (as for many years it has not complied) with the requirements of those statutes, or, at all events, did not furnish the means of ascertaining the average prices as prescribed by those statutes, the standard (with which the tithe rentcharge is to be compared for variation) ceased to exist, and, as no other standard has been substituted, variation in the present state is impracticable, and, therefore, impossible; and the rentcharge, as it existed before the order of the Justices which is impugned, must go on for ever unaltered—no matter how unfair the amount of the impost may be—unless and until the Legislature shall interfere.

The first of these statutes, 31 Geo. 2, c. 3 (Ir.) (1757), establishing premiums for land-borne corn to Dublin, was amended by the 33 Geo. 2, c. 12 (Ir.) (1758), which required the officials mentioned

in the Act to obtain returns on every sale of corn of the quantities, qualities, prices, vendees, vendors, places from which the grain was bought, and where sold, and, by section 19, to return to the printer of the *Dublin Gazette* every Monday "the middle price of corn for the week preceding, in order that it might be published in the *Gazette*." The next Act referred to, the 23 & 24 Geo. 3, c. 19 (Ir.) (1783), provided, for the purpose of bounty on exported corn, by s. 4, that, "instead of the mode now prescribed for ascertaining the prices of corn and grain, the prices of each species thereof shall, for the purpose of exportation, be ascertained and regulated by a medium of the average prices at which" the respective sales had taken place at the nearest public market on each of three market days next before the intended shipment. This statute also made provision (ss. 20, 21, 22, 23, and 24) for keeping a weekly register of the quantities and prices of grain in the counties, to be returned weekly to an official appointed for the purpose, who was to send a copy weekly to the Lord Mayor of Dublin, who was required to cause proper books to be kept by the Clerk of the Corn Market, of the quantities of all kinds of grain sold in the City of Dublin and Liberties; and, from all these returns of the total amount of the quantities and their respective prices (being 14½ stone of flour, equal to one barrel of wheat; 1 cwt. of oatmeal, equal to one barrel of oats; and 12 stone of malt, or one barrel of bere, equal to one barrel of barley), the Lord Mayor was to strike quarterly "the average price of each kind of grain for the six preceding weeks" and furnish it to the Commissioners of Public Revenue. To provide for default of the Lord Mayor, the Clerk of the Corn Market was (section 24) required to make weekly returns of the quantities and prices of all grain entered in his books to the official appointed to receive them, by whom was to be published, once a week, in the *Dublin Gazette*, and such other paper as should be directed by the Lord Lieutenant, an abstract of the said return.

The next Act referred to was the 25 Geo. 3, c. 10 (Ir.) (1785), which, reciting doubts about the meaning of the words "medium of average prices," enacted that "by adding the whole of the average prices together and dividing the amount by three"—three market days—"the quotient is the medium intended by the Act."

The next Act, 30 Geo. 3, c. 30 (Ir.), s. 9, enacted that the medium

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of the average prices, for the purposes of export, instead of being formed on the prices of the aforesaid three market days, should be formed on the average prices stated as in the previous Act, in each of the two weeks preceding the shipment, and prescribed the form: see vol. 15 of the Authorised Edition of the Irish Statutes, folio, pp. 238, 239. This form consists of two parts. It is headed, "An account of the average prices of corn and grain for the last two weeks at . . . , and the medium thereof." Part I. is headed "*Averages*," and contains six columns:—1, the weeks; 2, the grain; 3, the stone per barrel; 4, total number of barrels; 5, total prices; 6, average per barrel. Part II. is headed "*Medium*," and is divided into eight columns, for the different species of grain, giving in column 1, First Average, and Second Average, Total, and Medium.

In the view that I take of this case, it is not necessary to go more particularly into the details of these statutes; they fell into disuse long before their final and express repeal, but when, or under what circumstances, did not appear during the arguments, nor have I since had an opportunity of thoroughly examining into this point, because I have not had access to all the *Gazettes* for the past seventy-five years before and since Goulburn's Act was passed in 1823. I have, however, had access to a few of the *Gazettes* published during the last sixty years. In the *Gazette* of the 14th August, 1838, six years after Stanley's Act, the publication of the average price of corn is headed—"*The Dublin Market Note and Farmers' Weekly Report*"—"containing an abstract of the receipt and sale of all flour, wheat, barley, bere, oats, oatmeal, &c., sold at public market for the week ending August 10th, 1838—Wheat, 20 stone to a barrel; bere and barley, 16 stone; oats 14 stone (British currency)." Then follow, in separate columns, 1, 152 barrels wheat per bushel; 2, from 43*s.*; 3, to 49*s.* 6*d.*; 4, average price, 46*s.* 8*d.* Possibly the figure 8*d.* is a misprint for the figure 3*d.*; and, if this is the case, this average price is the sum of the maximum and the minimum prices divided by two. This publication then contains particulars of flour sales for the assize of bread. It is not signed by any official. The *Gazette* of the 28th January, 1873, is headed in the same way; gives quantities, 1119 barrels wheat, from 25*s.* to 34*s.*; average per barrel, 28*s.*, nearly the sum of the maximum and minimum prices divided by two.

This advertisement is signed by the Clerk of the Corn "Table." In the *Gazette* of the 11th February, 1873, the quantities are (and from that time forth, so far as I can ascertain) omitted. In the *Gazette* of the 23rd August, 1887, no quantities are given, but wheat (white) is given as "from 17*s.* to 17*s.* 6d., average price 17*s.* 3*d.*, which is the sum of the maximum and the minimum sums divided by two. The *Gazette* of the 30th August, 1887, is similar, the average price being the minimum and maximum prices added together and divided by two. It may be mere accidental coincidence that in these instances the average price agrees with the sum of the maximum and minimum prices divided by two. A few isolated *Gazettes* would not justify any general conclusion which could only be arrived at by an exhaustive examination of the *Gazettes* for the last seventy-five years. In the *Gazette* of the 6th September, 1887, and from that to the present, the "average" column is left blank; and as appears from the affidavits in the present case, the course for many years adopted at the Quarter Sesssons, on applications to vary tithe rentcharge, has been, and, in the present case was, to add together the maximum and minimum prices published weekly in the *Gazette*, and divide the sum by two.

Having so ascertained the weekly averages, the rest of the calculation is a matter of arithmetic. Such an average is not, in form or substance, an average according to the provisions of the Irish Bounty Acts, which appear to have been in force when Goulburn's Act was passed, but which subsequently fell into disuse. The advertisement in the *Gazette* has varied since Stanley's Act, and, again, in 1873 and 1887, while tithe rentcharges have all through continued variable, and have from time to time been varied by the Justices at Quarter Sessions in the way I have mentioned with reference to the only materials supplied by the *Gazette* for ascertaining the average price of corn, as advertised in the *Dublin Gazette*, during the seven years preceding the application; and this appears to have been sanctioned by the Legislature; because, in 1879, all these Irish Statutes relating to bounty and assize of bread were (with other Irish Statutes) expressly repealed by the Statute Law Revision (Ireland) Act of that year (42 & 43 Vict. c. 24), reciting in the preamble, as the reason for their repeal, that they "may be regarded as spent, or ceased to be in force

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otherwise than by express and specific repeal, or have by lapse of time and change of circumstances become unnecessary." But the Legislature, although it thus declared that for some indefinite period before 1879 (during which variations of tithe rentcharge were liable to be and were effected) these Irish Statutes had become obsolete, and had practically ceased to be operative, it did not deem it necessary to enact any new or other provisions for the variation of tithe rentcharge, or to interfere with, regulate, or control, the advertisements in the *Dublin Gazette*, to which alone reference was to be made by the Justices.

The question does not appear to me be one of arithmetic merely. The question is, Has the Legislature made any, and, if any, what provision, now existing, for the periodical increase or diminution of tithe rentcharge, having regard to fluctuating and falling prices of corn? The Legislature has not undertaken to regulate or control the *Gazette* publication; but it has set up one sole standard throughout Ireland to govern the variation of tithe rentcharge—viz. reference "to the average price of corn as advertised in the *Dublin Gazette*"—to be appealed to, as it is found to exist in fact, on each occasion when an application is made to the Justices to increase or diminish the existing tithe rentcharge; and it is not, I think, a reasonable construction to attribute to the Legislature an intention to perpetuate for the receiver the right to receive the amount of tithe rentcharge fixed when corn prices were high, and to abrogate the corresponding right of the payer to have the amount varied when those prices have notoriously largely fallen.

As materials are to be found in the *Gazette*, to which alone reference is to be made, I think it is more reasonable to conclude that the Legislature intended those materials to be adopted and used by the Justices in the only way in which they can be used, and were used in the present case, and have for many years been adopted and used by the Justices at Quarter Sessions on applications from time to time to vary tithe rentcharge.

For these reasons I think the first ground of objection to the order of the Justices fails. The second ground taken against the order of the Justices was scarcely pressed in argument. The certificate of composition is dated the 27th November, 1833, after the

passing of the 2 & 3 Wm. 4, c. 119; it is therefore septennially variable. The composition commenced on the 1st May, 1834 (5 Geo. 4, c. 63, s. 17); the notice of application was served in September for the next ensuing Quarter Session—that is, the Session next ensuing the application—to be held at Kells, where the order was made reducing the rentcharge, the reduction to take effect from the 1st May following, being the month when the original composition commenced. The application was made in due time; and the order, though dated the 20th November, relates to the application. This objection therefore also fails; and, in my opinion, the conditional order for a writ of *certiorari* ought to be discharged.

O'BRIEN, J.:—

A state of law has been acted on for somewhat about twenty years, during which the error now alleged has existed; for it appears that it was then that the proper average was dropped, and the mean price inserted instead, in the column for average, and that this practice continued till the year 1887, when the column was left blank, and the highest and lowest prices merely given. So that, if this motion should succeed, there can be no revision of tithe rentcharge for seven years to come; for, until that time, there will be no returns in the *Gazette* for the preceding seven years on which the average can be calculated; and, besides, every order that has been made for the whole period of time in the past will be open to be impeached as having been illegally made, and no answer to an action for the full amount of the tithe rentcharge.

These are consequences so alarming as to turn the mind upon the consideration of the question whether a discretion exists to refuse a *certiorari* altogether. But I consider that it is not necessary to enter into a question as to such a discretion, which, if it exists in law, we are not at liberty to abandon the right to exercise, should a proper occasion arise; but from which, even if authority for the course exists, decision has tended to recede under the influence of a feeling against substituting for rules of law the variable and treacherous standard of discretion. For I consider, notwithstanding the miscarriage, if any, that has occurred, that

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the order is legal and incapable of being impugned. The statute required two things—the original certificate, as the standard of comparison—and the evidence from the *Gazette*, as to the thing to be compared with it—in order to carry out the scheme of tithe composition, which, as it was founded on the price of corn, was by the principles of its existence to follow the variations of price. Except that the amount of the composition did not change unless it was changed by the tribunal of revision, there is nothing in the whole code that gives rise to the idea of absolute right, governed by the presumption of continuance, and affecting the strictness of the conditions that were required to displace it. Tithes were property, no doubt, and not to be taken away, unless as directed by the statute. But it was a species of property that received its form and mode from the institutions of law. The composition came into existence attended by an inherent condition of change and subject to that principle in its creation. How was that change to be effected? By means not wholly within the control of the party nor even of the law. The law established an immovable point to start from—the certificate of the average. That was within its own control; but it possessed no control, and the party possessed no control over the *Gazette*, which, nevertheless, was the means of evidence provided by the law. The Tithe Composition Acts found the *Gazette* in use under the Irish statutes for the purpose of what were called the export duties or bounties; and those statutes, under penalties, directed returns to be made by the persons in charge of markets, and a certain person appointed for the purpose, and to be furnished to the *Gazette*, but the *Gazette* itself was under no legal sanction. So that, in construing the Composition Acts, we are brought to a situation in which a great measure of public right was made to depend, in part of its machinery, upon the performance of an act which could not be enforced, and which was attended by no responsibility for error or miscarriage. This was even the case where the average was omitted in the certificate, in which case the Tithe Rentcharge Act required the defect to be supplied from the *Gazette* at the time of the composition. It is to be observed that at first the *Gazette* was not the statutory means of evidence alone; for, under the 4th Geo. 4, it was the arbitrator alone that was required to ascertain

the average. But we may take it that a very short experience sufficed to inform the Legislature of what, in modern times, we have no difficulty in believing—the perilously uncertain nature of oral evidence of value in questions of rival pecuniary interests; for the immediately succeeding Act, the 5 Geo. 4, c. 63, corrected the mistake, by providing, in section 23, that, in compositions by agreement, the increase or diminution should be made only with reference to the average price of corn as advertised in the *Gazette;* and, by section 24, as to statutory compositions, in language of still greater emphasis, that reference should not be had to the price of corn within the county, but reference should only be had to the price of corn as advertised in the *Dublin Gazette*, anything in the previous Acts to the contrary notwithstanding. If the *Gazette* were a blank, or there were no *Gazette*, what would happen? *Ruat cælum.* There must be an Act of Parliament. But the *Gazette* is not a blank, and it is the thing the Justices must look at, and must take whatever it professes to give, from which, as it appears to me, by any strain of construction, they must make out what they are directed to make out. If the *Gazette* stated an average alone, which was wholly erroneous, it is certain the Justices would be bound to follow it; and, if the materials were wrong, and the result made out by themselves were erroneous, the same conclusion must be come to.

In discussing this question, it is necessary to take a short review of the constitution of the machinery on which a right of property so extensive depended. The system of returns of the price of corn took its rise from the statute 19 Geo. 2, c. 17, under which the persons in charge of markets were required to make a return of the quantities of wheat "and the real prices of such corn," and every week these were to be duly entered in a book to be kept by the Chief Magistrate for that purpose, wherein the true and real prices of all wheat should "every week be duly entered" and set down in order the more effectually to ascertain the middle price of wheat" for the settling of the assize of bread. The mode in which the middle price was to be arrived at is not prescribed, but may reasonably be conjectured to be by the result of the proportion between the total quantity and the total price. This term "middle price," no doubt identical with the average

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proper, was continued into the statute 33 Geo. 2, which was passed in order to guard the revenue against unjust and excessive claims for bounties or premiums, as they were called, on the growth of corn—in which, for the first time, so far as I can find, publication in the *Dublin Gazette* is mentioned. A person named Smith was appointed by that statute, with power to employ a deputy and clerk, to receive the returns; and it was enacted "that such officers should respectively, on Monday morning in every week, return to the printer of the *Dublin Gazette* the middle price of corn for the week preceding, in order that the same may be published in the *Dublin Gazette*."

These statutes were followed by the 23 & 24 Geo. 3, which enacted that, instead of the mode then existing for ascertaining the prices of corn and grain, the prices of each species of corn should, for the purpose of export, be ascertained and regulated by "a medium of the average prices" at which the corn should have been sold on each of the three market days preceding the shipment, and then it went on to prescribe an elaborate machinery for collecting the returns of the quantities and prices of corn sold in the counties, in the city of Dublin, or by private individuals, so as ultimately to reach the Lord Mayor of Dublin; and, from the total of the quantities from all quarters, and the prices, he was required, every quarter, to strike the average of each species of grain, and to deliver to the Commissioners of the Revenue "a true and exact account of such average price of each species of grain respectively"; "and, in order to provide in case any such Lord Mayor or other magistrate should neglect or refuse to deliver the account to the Commissioners, the Clerk of the Corn Market of Dublin was required, once in every week, to send his return to the person appointed by the Lord Lieutenant to receive the other returns, and the person so appointed was directed, once every week, to publish in the *Dublin Gazette* an abstract of the return for the city of Dublin, and all the other returns sent to him; and, if any Lord Mayor should refuse or neglect to deliver to the Commissioners the account mentioned, or if in such account the price of any species of grain was omitted, they were to order the average price of each species of grain, or of the species that had been omitted, to be struck from the abstracts in the *Gazette*, in like

manner as the Lord Mayor ought to have struck them, and the average price so struck was to be published by their order in the *Gazette*, and to be deemed the price struck in the city of Dublin until the succeeding quarter.

It thus appears that there were two concurrent forms of machinery—the quarterly account of the average which the Lord Mayor was required to deliver, and, in his default, the Commissioners were to make out from the weekly abstracts, and were to publish in the *Gazette*—and the weekly abstracts which the appointed officer was required to publish, not stating any average. After a time the Lord Mayor is found to have dropped out of the machinery; the functions of Grand Juries as to providing returns from counties ceased, and, with the disappearance of bounties, the quarterly average of the Commissioners of Revenue no doubt fell into disuse, leaving the weekly returns alone standing, made out by the person to whom the office created by the statute descended.

Now, under the fourth section, what was to ascertain and regulate the prices of each species of corn for the purpose of export was to be the "medium of the average prices at which said corn had been sold"—*average prices*, in the plural, applicable to each species of corn, and not to species in the plural. If *average* in the ordinary sense, had been intended, that would be a single result, and there would be no meaning in the word *medium*, whereas if there were two elements of price, the term would have a proper use. And this is important to bear in mind, not only with reference to the interpretation put upon the term in the succeeding statute of the 24 Geo. 3, but to subsequent enactments in which the Legislature returned to the first mode of calculation and adopted it in equivocal terms, which may be considered perhaps to involve the principle on which the practice now in use assumes to be founded. Section 2 of that statute says that, "whereas some doubts have arisen about the meaning of the words 'medium of the average prices,' contained in the said Act, be it declared and enacted that by adding the whole of the average prices together, and dividing the amount by three (the total of three market days being included), the quotient is the medium intended by the said Act"—*not* that the total of the prices shall be divided by the total quantity of barrels, so as to bring out the price of a barrel. Of

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course it must mean the average prices of each kind of grain separately, for it was of that the price was to be ascertained. That is, the medium was to be that, not of two quantities, but of three, corresponding to the number of the markets, so that there was first an average of prices for each market, and then an average of markets. But so far there was no duty or authority on the part of the person making the returns to the *Gazette* to strike the average at all. He was merely to furnish the quantities.

In order to carry out the system now suggested as the only legal and proper one, there must be an account of the price of each parcel of corn sold in public and in private, involving a burthen, or even an impossibility of inquiry, under which it was inevitable such a system should break down; and, accordingly, we are prepared to find that, if it was attempted at all, it was quickly abandoned.

Now we come to the statute 30 Geo. 3, c. 30, by which the whole machinery of the returns was reconstructed. It was the leading and final statutory provision that, at the time of the Tithe Acts, regulated their form; though it is certain that, in the application of the returns to those Acts, several of the particulars have long become obsolete and disused, if at any time they were used at all. Under that statute the chief magistrate of every town was required to collect weekly accounts of the quantity of corn sold, and the cost, and, "in forming the averages and the medium of the prices of corn," to include what had not been sold in the public market; and it was declared that "every return of the medium and averages so formed should be deemed and taken to be the return of the medium and averages within the former Act. Section 9 substituted two weeks for three in forming the medium of the average prices for the purpose of export, and directed every return to be made by any magistrate of any town to any collector pursuant to the provisions of any former or that Act should be in the form following, which is in the body of the Act itself. This form is headed, "An account of the Average Prices of Corn and Grain for the two last weeks at . . ., and the medium thereof." Then follows another heading—"Averages." To this are subjoined several columns, first, "For the weeks ending . . ." (in which there are three weeks not two, as altered by the statute itself); then,

"Species," "Stones of 14 lbs. in a barrel," "Total number of barrels," "Total prices," "Average per barrel." And then succeeds another set of columns, all headed "Medium" (comprising each species of grain, and preceded by a column of distinctions applying to all) in these words, "First Average," "Second ditto," "Total," "Medium." I take it that the separate averages were for each week, that the total was of both weeks, and then the medium the mean of the prices of the two.

In what way the nature of the returns thus prescribed came to depart from, and the transmutation took place that is found to have occurred before an explanation could be sought in the Statute Law Revision Act, as repealing these Irish statutes—how the Lord Mayor dropped out—how no returns came from the counties—how the Grand Juries ceased to appoint persons to make returns—and how the market of Dublin alone was to be the test of price, it is not easy to follow; but it is certain that from a very early period the directions of the statute were not literally obeyed; and it is not easy, even if possible, to explain or account for their variations. In 1820, before the returns were required for the Composition Acts, the form in the *Gazette* was called, "An Abstract of the Returns of the Quantities and Prices of Grain sold in the city of Dublin and the Liberties thereof for the week ending . . ." and contained, in separate columns, the species of corn, the total of the quantities, the average per barrel, and "the Medium Price," whatever that was the result of (it could not, however, be referred to two weeks, for the return was for but one week), unless it meant for separate markets, and in that case must suppose two averages. Mr Justice Johnson has shown me, on the other hand, the return for 1838, the year in which the Tithe Rentcharge Act passed, in which, under the heading, "Abstract of Returns," the total of the quantities is given in one column, then two columns of prices per barrel, headed by the words "From . . ." "To . . ." as in the present form, and then a column headed "Average," which is not exactly the mean of the preceding prices, and yet no medium at all. This may be considered literally to comply with the statute by giving the average alone; but, while it gives one factor in the rule of proportion—the total quantities, it omits the other—the total prices, stating the devisor and the quotient, but not the

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dividend, and violating the statute in the omission of the medium altogether. And this is likewise the return to be found in the years 1823 and 1824, but under a different heading, namely, "The Dublin Corn Market Note and Farmers' Weekly Report." In the year 1873, the highest and lowest prices were given; and the average price, which was not exactly the mean; and both the totals of the quantities and of the prices were wholly omitted. Some time after that date, but in what year has not with the opportunities that existed been ascertained, nor whether before or after the Statute Law Revision Act, the mean price was substituted for the average in the column of average; and, since 1887, it appears the mean price was not stated at all, and the average column left blank.

The form of return in the *Gazette*, which is at present in use, and on which the question has arisen, was exhibited on the argument, and is headed, "An Abstract of the Average Prices of Corn for the week ending . . ." It contains two columns of prices per barrel, headed with the words, "From . . .," "To . . ." (as in the return for the year 1838), and a column headed "Average per barrel," which is blank. I quote it from memory, but this is the substance of the form. There is no statement of total quantities or total prices.

This, therefore, is the document on which a question of such vast moment hangs, the basis of the sliding scale which the law has provided to make tithe rentcharge follow the variations of price, in accordance with the original specific measure of such property. The parties affected possess no power to supply or vary that evidence, with which, however, for the exercise of their rights, they cannot dispense. They must take the *Gazette* as they find it, or be deprived of their right—a privation the more galling as it is a right applying to tithes, where there was no contract—the rule displacing contract to which other property nevertheless is forced to succumb.

Even before the Statute Law Revision had swept the whole machinery of the Irish statutes, with the penalties attendant upon it, there was no penalty against the proprietors of the *Dublin Gazette*, whose fault is complained of. They were under no legal obligation to anyone. No mandamus would have lain against them.

But the Act of Parliament says that the increase or diminution of price shall be made only with reference to the average price of corn as advertised in the *Dublin Gazette*. This is made the sole repository of the evidence on which so important a right stands. The Justices are commanded to act upon it. The arbitrator, if appointed—whose function must be taken to be what the term implies, and not merely a matter of arithmetic—is directed to act upon it. The condition is legally fulfilled; the prices *are* advertised in the *Gazette*. They are stated to be the average prices. If there are two sets of prices, or if the return be ambiguous, or if it be admitted that they are maximum and minimum prices, it is competent to the Justices, in my opinion, to accept the mean of those prices. Whatever it be, it is the *Dublin Gazette's* description of the average. The Justices have authority to apply the statement, but not to contradict it.

I should have been of this opinion if the Statute Law Revision Act had not passed at all, because the *Gazette* was not bound or ordered to obey any of the statutes; and it is what is in the *Gazette*, and not what is directed by the statutes, that is made the evidence. But that Act has altered the whole groundwork of the case. For I take it to be certain that there is not any fragment of these statutes preserved by the Revision Act or by any principle of statutory construction, not being incorporated or adopted into, or even referred to, in the Tithe Composition Acts. The name of the *Gazette* is the only thing common to both, the only thing that both refer to. There is therefore no law in existence as to how the average price is to be ascertained or made out, so as to make what is stated in the *Gazette* to be the average not the average. If we were to invoke the Legislature, and it were to interfere upon a distinction that practically is of no moment—between average and mean price—and that—after changes in the whole machinery—after "average" has come to mean a different thing—after the average of Dublin has been substituted for the average of Ireland, which would not perhaps yield the same result—what could the Legislature do? It cannot replace past time; it cannot change 1897 into 1890. Where will be found the average of the past years on which the composition is to be fixed? Then, if this legislative creation be impossible, it must declare the existing

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standard to be law—the standard we are asked to condemn—and the orders founded on it to be valid, including the order now impugned. This is not a question of enactment, but of the restrictions that the laws of nature put on legal power by the irresistible effects of time. Are we, on the contrary, to declare the law of tithe composition at an end, or suspended, for seven years, or until a new creation has taken place—to erase time past, and root out the transactions of twenty years—to tear up all the orders that have been made in that time—what the Legislature could alone do, if it were called upon. What it has done by its own positive act, I consider we are bound to follow, and to hold that this order is legal, in opposition to a decision which would cause a flame of confusion in public rights, the extent of which it is hardly possible to imagine or circumscribe.

PALLES, C. B. :—

With great reluctance, but after much consideration, I have arrived at the conclusion that the order sought to be brought up is bad, and that the only remedy of the tithe rentcharge payers is by resort to the Legislature.

The duty of the Justices, upon the application to vary, is defined by sect. 32 of 1 & 2 Vict. c. 109, in these words—"And all such and the like proceedings shall be had," upon the notice of the application, "as by the provisions of the said several Acts, for establishing compositions for tithes in Ireland, authorised and directed in the case of application thereunder, and such composition shall be increased or diminished, and the applotment thereof amended accordingly, and the rentcharges payable in lieu thereof increased or diminished in like proportion."

The rentcharge, then, is to be varied in the like proportion as the composition under the Tithe Composition Acts. There is no jurisdiction to increase or diminish in any other proportion; and, if this proportion cannot be ascertained in the manner directed by the Tithe Composition Acts, there is no jurisdiction to vary at all. We have, therefore, to proceed to ascertain this proportion, and to do this we are driven back to the consideration of the Composition Acts.

The first of these Acts is "Goulburn's Act," 4 Geo. 4 c. 99. It,

by its 43rd section, directs the Justices "to ascertain the *average* price of good marketable wheat or oats within the county for the term of three years next preceding" the application; and power is thereby given to the Justices, if they shall think fit so to do, but they are not required, to appoint an arbitrator, who is "authorised and required, from the *Dublin Gazette*, to ascertain the price of a barrel of good marketable wheat or oats, upon the average of such term of three years preceding," and to report such average price to the Justices. The average price, capable of being ascertained from the *Dublin Gazette*, will appear, from the statutes to which I shall refer later on, to be the average price throughout Ireland, and not the average in the county. Still, the determination of the Justices, even after the report had been received, was to be the average in the county; and therefore, under this section, the average ascertained from the *Dublin Gazette* can have been but an element in enabling the Justices to arrive at the average in the county.

Another section of this Act, the 25th, has been relied upon by Mr. Matheson in support of the order of the Justices, and it is convenient that I should refer to it here. It relates to the certificate of the amount of the original composition, and it directs that there shall be subjoined to that certificate a statement "of the *average price* of wheat or oats, whichever they" (the Justices) "shall consider as the corn principally grown in such county, calculated *upon the returns* advertised in the *Dublin Gazette* during the seven years next preceding the 1st November, 1821."

Goulburn's Act was amended by an Act of the next session, 5 Geo. 4, c. 63, the 24th section of which enacted that whenever a composition should be varied reference should not be had to the price of corn within the county, but should be had *only* to the price of corn as advertised in the *Dublin Gazette*. The immediately preceding section, the 23rd (which, no doubt, relates to a particular class of compositions only) directs that, in cases within the section, the variation "shall be made" only with reference to the average price of corn as advertised in the *Dublin Gazette* during the seven years immediately preceding. In reference to a case within both sections, "price" in sect. 24 must be identical with "average price" in sect. 23; and for this, as well as for many other reasons

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which will occur to anyone reading the statute, it seems certain that "price" in the 24th section, in reference to all cases, means "average price."

The next material Act is Stanley's Act, 2 & 3 Wm. 4, c. 119. That statute, by its 6th section, made compositions perpetual, and provided that certain compositions, of which that under consideration is one, should be subject to variation in every seventh year; and then proceeded in these words—"Provided that the amount of all compositions . . . shall be increased or diminished with reference to the average price of corn advertised in the *Dublin Gazette* during the seven years immediately preceding, and not otherwise."

The whole question in the case appears to me to be, what is the meaning of these words, "Average price of corn advertised in the *Dublin Gazette*," as they occur in this section. To determine this we have two aids. As to the first, we are told by the 25th section of Goulburn's Act that the *Dublin Gazette*, during the seven years which preceded the 1st November, 1821, contained returns from which the average price during those seven years could be calculated. Again, it is clear that it is a condition precedent to the jurisdiction of the Justices to vary, that the price ascertained by them, on an application for revision, as the average price for the seven years preceding, should be compared by them with the average price for the seven years preceding the 1st November, 1821. Such a comparison involves that the word "average," as applied to each of those prices, means the same thing. Therefore, if we can ascertain the meaning of this word "average" in reference to the earlier period of seven years, we have determined its meaning in reference to the duty of the Justices in the present case.

Now, to determine the meaning of "average," in reference to the earlier period of seven years, *i.e.* its meaning in the 25th section of Goulburn's Act, we are entitled to look to the returns for that period, because they are actually referred to in the section; and upon looking at them we find that they contain matter which is sufficient to enable the arithmetical calculation directed by the Act to be made. They contain the total quantity of the particular species of corn sold during each week, and the total amount of the

purchase-money upon such sales. The sum of the purchase-moneys stated in those returns to have been received on sales of any particular species of corn during the seven years, being divided by the total number of barrels of that corn stated in the *Gazette* to have been sold during the same period, will give a quotient which will accurately represent for such period the average price of such corn within the meaning of sect. 25. Further, this price, as ascertained, is in all strictness and technicality the exact average price of the commodity during the period in question. Thus, "average," in this 25th section, is used in its ordinary grammatical sense.

I should add, before leaving the returns during the earlier period of seven years, that they also contain a column headed "Average Price"; but as the period over which those averages are taken is different from the period of seven years mentioned in the Act, the entries in this column alone cannot help the calculation, and, but for the statement in the returns of the total quantities sold and the total prices realised, the calculation of the average mentioned in the section would be impossible.

Mr. Justice Johnson appears to me to have attached weight, in the construction of the statute, to the forms of return adopted in the year 1887. With all deference, I am unable to regard these returns as legitimate elements to be taken into consideration for such a purpose. Being subsequent to the Act, they cannot be used unless they amount to a *contemporanea expositio*; and a practice commencing at so late a period, and commencing after subsequent statutes in *pari materia*, cannot be said to be cotemporaneous with a statute passed in 1758.

Our second aid in ascertaining the meaning of "average" in the Act arises from the fact that the Legislature contemplated the continued publication, after the Act, in the *Dublin Gazette*, of some returns, and legislated upon that basis. If, then, the character and essential particulars of those future returns are directed by prior statutes, we can ascertain that character and those particulars from those prior statutes, and avail ourselves of them, when so ascertained, for the purpose of construing the new statute which impliedly directs their continuing use.

The first of these statutes in force at the time of the passing of Goulburn's Act was the 23 & 24 Geo. 3, c. 19 (Irish). The

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prior Acts relating thereto were repealed by that Act. They have been referred to at length by my brother Johnson, but in my view they do not assist us in ascertaining the construction of the later statute. I therefore do not discuss them in detail. In consequence, however, of his reliance upon the expression "medium of the average prices" contained in sect. 4 of the 23 & 24 Geo. 3, it will be necessary for me to refer to the provisions of that statute at somewhat greater length than I should otherwise have thought it necessary to do. The preamble is that the laws theretofore made had not proved sufficient for the effectual encouragement of agriculture, and that the corn trade required in many instances to be newly regulated. The statute then contained provisions of three classes. By sect. 2 it allowed bounties upon the exportation of corn, the growth or produce of Ireland, shipped in ships which answered a particular description. The bounty on wheat, which is the particular description of corn by which the composition in the present case is to be regulated, was 3*s.* 4*d.* a barrel when the price of wheat, "ascertained in the manner hereinafter directed," should not exceed 27*s.* a barrel. Secondly, by sect. 5, it prohibited, under a penalty of £5 a barrel and the forfeiture of the ship, the exportation, *inter alia*, of wheat out of any port, when the price of wheat in such port, "ascertained in manner aforesaid," should be at or above 30*s.* a barrel. By sect. 6 it further prohibited any such exportation when the price of wheat, "as ascertained in the city of Dublin in manner hereinafter mentioned," shall on the preceding quarter day be at or above 30*s.* a barrel, although the price at the port, "ascertained in manner aforementioned," shall not be at or above the same. By sects. 9 and 10 an import duty is imposed upon wheat, according to its price, "ascertained in the city of Dublin on the quarterly day next preceding such import, in the manner hereinafter mentioned," and it fixes the duty at 10*s.* a barrel, "when the price of wheat so ascertained" shall be under 30*s.* a barrel, and at two pence a barrel when the price "so ascertained in the city of Dublin" shall be at or above said price.

Section 17 enacts that whenever the price of wheat, "ascertained in the city of Dublin in manner hereinafter mentioned," shall be under 30*s.*, and not less than 27*s.*, wheat, of British growth, imported from Great Britain, should be exempted from

any higher import duty than two pence a barrel, such exemption to commence so soon, and to continue so long, as similar articles of Irish growth, when exportable from Ireland, should be allowed to be imported into Great Britain upon the like or lower duties.

It appears from these sections that two distinct sets of prices were to be ascertained: the first, that mentioned in sect. 5, the price of wheat in the port of exportation, described as "ascertained in manner *aforesaid*"; secondly, the price "as ascertained in the city of Dublin in manner *hereinafter* mentioned." The latter is the price referred to in the 9th, 10th, and 17th sections.

These two separate descriptions of prices have wholly different functions. The first is material in reference to the first prohibition against exportation, viz. that contained in sect. 5, the subject-matter of which is the price of wheat at the port of exportation. The second is the basis of three provisions, viz.: (1), of the prohibition against exportation in sect. 6, which was dependent upon the price ascertained in Dublin; (2), of provisions as to import duties; and (3), as to bounties.

Now it is to the first of these sets of prices, the price at the port of exportation, that the expression, "medium of the average prices," mentioned by my brother Johnson, refers. It occurs in section 4, which directs that the prices of each species of corn and grain shall, for the purposes of export, be ascertained and regulated by "a medium of the average prices" at which it shall have been sold in the public market at or nearest to the place of exportation, on each of the three market days next immediately preceding its shipment. These "average prices, with the medium thereof," the chief magistrate of the place is required, under a penalty, from time to time to procure and return in writing to the chief revenue officer of the port once in every week; and provision is made as to deeming a certain other price to be the average price at the port if there is no such magistrate, or if the magistrate neglects to return "such prices and medium," or if by any other cause the price of any species of grain shall not be ascertained at or for any port, in the prescribed manner.

It will be observed that in this section the words "medium" and "average" are used as having wholly different meanings,

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"medium" probably meaning "mean." These prices are not directed to be advertised in the *Dublin Gazette.*

I now come to the sections which prescribe the mode of ascertaining the second set of prices, which are those material here. They commence with section 20, which defines its object in these words: "In order to ascertain in the city of Dublin the price of corn and grain on four quarterly days in the year, for the purpose of regulating the import and export, and bounty upon export, of each species of grain, and inasmuch as a register of the prices at which corn is sold in the several counties of this kingdom will be a public and general advantage"; it then enacts that the Grand Juries shall, at each spring assizes, direct returns to be made weekly of the *quantities* and *prices* of the various species of corn from such and so many of the market towns of the description therein specified as they shall think proper; and it provides for the appointment of a person to make such returns. Section 21 directs that the person appointed shall verify the returns, and swear that "the *quantities* and *prices* therein contained were the real and true quantities and prices." The 22nd section directs that these returns shall be made to the person appointed for that purpose by the Lord Lieutenant, and that person is required to enter them in a book, and once in every week to send a copy thereof to the Lord Mayor of Dublin. The 23rd section directs the Lord Mayor to cause books to be kept by the Clerk of the Corn Market, in which "the *quantities* and *prices* of all kinds of corn sold in the city shall be duly and regularly entered, and also cause to be entered in the book the several returns made to him under the 22nd section; and from the total amount of the *quantities* and their respective *prices* in the said entries and returns . . . the average price of each sort of grain for the six weeks immediately preceding shall be struck by him within five days after each of the quarter days specified." The section then proceeds to direct the Lord Mayor, upon striking "the said average prices," to deliver to the Commissioners of Revenue a true and exact account, under his hand and seal, of such average prices, under a penalty of £500.

This brings me to the section directing the publication in the *Dublin Gazette.* It is section 24. Its object, as recited, is to pro-

vide against the Lord Mayor neglecting to deliver the account directed by the 23rd section; and it enacts that the Clerk of the Corn Market shall send to the person appointed to receive the returns "an exact return, signed by himself, of the *quantities and prices* of all grain . . . sold in the said city as entered by him in the books aforementioned, verifying the same by affidavit at the foot thereof; and such person appointed to receive the returns as aforesaid shall once in every week publish in the *Dublin Gazette* . . . *an abstract of the said return, and of the several other returns made to him by virtue of this Act.*" It further enacts that if the Lord Mayor shall neglect to deliver such account to the Commissioners, or if in it the price of any species of grain shall be omitted, the Commissioners shall order the *average* price to be *struck from the abstracts aforesaid, published in the Dublin Gazette*, for the like time and in the *like manner* as such Lord Mayor ought to have struck them, and the average price so struck shall be published by their order in the *Dublin Gazette*, and shall be deemed the price struck in the city of Dublin until the next quarter day.

It is essential to bear in mind that it is from the "total amount of the quantities and prices in the said entries or returns" that the average is to be struck by the Lord Mayor; and therefore the purpose for which this "abstract of returns" is directed to be used, *i. e.* the striking of the average "in the like manner," could not be effected, unless such abstract contained a statement of the total quantities sold during each week, and the total prices.

Further, I have to observe that the publication in the *Gazette* of the weekly averages, as distinguished from the weekly quantities and prices, would not have satisfied the purpose of the Legislature, because in the event of the omission which it is the function of these returns to provide against, the only materials for the six-weekly averages, which were to be prepared within five days of each quarterly day, would be the six weekly averages for the six weeks in question, and from those six weekly averages, without knowing the total quantities and prices of each week, the averages for the six weeks could not be ascertained.

Thus an elaborate series of enactments makes precise provision for ascertaining, with exact accuracy, each of the factors from which is to be arrived at, as an arithmetical result, "the average

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price ascertained in the city of Dublin," mentioned throughout the Act: a result of great national moment, regulating exportation, importation, and bounties. The last step in this elaborate machinery is the weekly publication in the *Dublin Gazette* of an abstract of the weekly return of the total quantities and prices of each species of corn sold throughout the entire of Ireland.

Lastly, I must remark that these total quantities and prices are sufficient to enable an average for any period to be struck, such as a septennial average; and it is certain that these elements must have been in the contemplation of the Legislature, when by the Composition Acts they made the advertised abstracts the sole material from which the *septennial* averages were to be ascertained, because without such total quantities and prices such septennial averages could not be arrived at.

The 25 Geo. 3, c. 10 (Ir.), s. 2, recites that doubts had arisen about the meaning of the words "medium of the average prices" contained in the prior Act; and enacts that by adding the whole of the average prices together, and dividing the amount by 3, the quotient is the "medium" intended by the Act. This Act refers to the price at the ports, with which we are not concerned. It is useful, however, as continuing to emphasize the difference.

The last Ante-Union Act I shall refer to, the 30 Geo. 3, c. 30, continues to recognize the distinction between "medium" and "average." It enacts that the Chief Magistrate of every town or city, being a port, shall receive, from all buyers of corn for sale or export in or within five miles of such town or city, a weekly account of the quantity of corn received during the week, with the cost thereof. These returns are to be verified by oath. Sect. 6 directs that every Chief Magistrate who shall receive any such account shall, in forming the *averages* and *medium* of the prices of corn pursuant to the Act of 23 & 24 Geo. 3, include so much of the corn in the return as shall not have been sold in public market, and by sect. 9 it prescribes the form of the return to be made by magistrates. That form is headed "An Account of the average prices of corn and grain for the last two weeks at . . . and the medium thereof," and it contains columns as well

for the total number of barrels, and the total prices, as for the average per barrel.

Upon a careful consideration of these and the other statutes of the Irish Parliament referred to during the argument, and to which I do not think it necessary to refer more particularly, I have arrived at the conclusion that the essence of the abstract which was directed to be published in the *Dublin Gazette* was the total quantities sold, and total prices obtained, for each species of corn sold within the specified period. These figures enabled the average for any period of time to be ascertained with arithmetical precision; and in my opinion it is from these total quantities and prices, and from these alone, that the Legislature intended that the average under the Tithes Composition Acts should be ascertained. In other words, upon an application for variation, the Justices should take the *Dublin Gazettes* for the seven years preceding the application, should calculate from them the total number of barrels of the particular species of corn sold during that period of seven years, and the total prices obtained therefor, and should divide the total amount of those prices by the total number of barrels sold. The quotient would be the "average" within the Act; and, it is arithmetically certain, this quotient is a figure which it is impossible to ascertain in any other mode.

I pass on now to the 7 Geo. 4, c. 48. The 52nd section of that Act repeals all statutes relating to the revenue of customs (of which the 23 & 24 Geo. 3, c. 19, Irish, is one), with an exception immaterial here; and by the Irish Statute Law Revision Act of 1879 (42 & 43 Vict. c. 24), all the Acts of the Irish Parliament to which I have referred are in express terms repealed, subject to an exception, *inter alia*, that it shall not affect any Act in which the repealed Act has been "applied," incorporated, or referred to.

I desire to abstain from expressing any opinion as to whether the Tithe Composition Acts did not, by implication, impose duties which continued to exist, notwithstanding those repeals, upon the Clerk of the Corn Market in Dublin to continue to send, to the person appointed to receive them, returns in the previous form, and upon that person to publish them in the *Dublin Gazette*. These are questions which, possibly, may be agitated hereafter; and they cannot, in my view, affect the present case; for, whether

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the statute did or did not exempt the Clerk of the Corn Market and the person appointed to receive the returns from their previous duties, the returns, as published in the *Dublin Gazette*, during the septennial period dealt with by the Justices here, omit to state the two essential elements of "total quantities sold," and "total prices," nor even do they state that which, in my opinion, had it been stated, would not have been sufficient, the average price within the week.

I desire to make this latter proposition clear, because the contention which has found acceptance with my brethren who have preceded me is that the average price has been impliedly stated. Supposing that the column headed "Average Price," in the form used during the septennial period in question, had been filled in in each weekly return, the Justices would have had before them the weekly average prices, but by adding together the averages for all the weeks included in the septennial period, and dividing the amount by 365, the number of weeks in that septennial period, the quotient would give a result which would neither be the true average, in its ordinary grammatical sense, nor, as I have endeavoured to show, the "average" within the meaning of the Tithe Composition Acts. To ascertain the average for the septennial period it is essential to have the total quantities and prices. The frame of the returns during the last seven years has three columns. The first is headed "From"; the second is headed "To"; and the third is headed "Average." The first and second are duly filled up; the third is left in blank. As I read these returns, they state no more than the *maxima* and *minima* prices. This, no doubt, is a statement that there were two sales, one at each of those prices; but the return does not state whether there was any other sale, nor can I assume that it purports so to state. Even if I were to make the manifestly false assumption that it does so, it does not state the quantity included in each of the two sales; and therefore, to ascertain even the *weekly* averages upon the figures in these returns, it should be assumed, not only that there was no sale but the two, but that the quantities sold on each of the two occasions were equal. On no other assumption would the mean price between the *maxima* and *minima* be the average; and even if all this is assumed, all that could be arrived

at would be the weekly average, which would not be even a factor towards ascertaining the septennial average.

It must be admitted that the only result that can be arrived at from the *Gazette* is the "medium" of the weekly price. But this is neither the "average" within the meaning of section 20 of the Act of 1783, nor "the medium of the averages" within the meaning of section 4, and even if it were identical with the latter, it would be of no avail here, as that "medium of the averages" is useless, save to ascertain the price at a port, whereas the matter in hand here is the price throughout Ireland.

Upon these grounds, with great reluctance, but feeling compelled thereto by the mandatory words of the Tithe Composition Acts, I am coerced to hold that, as there was no evidence before the Justices of the existence of the state of facts which was an essential preliminary to the attaching of their jurisdiction to vary, viz. a variation of one-tenth between the two statutable standards, there was such a total absence of jurisdiction as requires us to issue a *certiorari*, notwithstanding section 57 of Goulburn's Act, if indeed that section, which takes away the *certiorari*, be at all applicable to the case—a matter upon which I refrain from expressing an opinion.

I am painfully sensible of the hardship—shall I say the injustice—of tithe rentcharge payers being deprived of their clear rights by either the action or inaction of those over whom they have no control. Whether it be the action of the Legislature, or the omission to appoint the person who by the Act of 1783 is directed to publish the abstract, or the omission of that person, if he in fact exists, or of the Clerk of the Corn Market, that this result has ensued, it is not for me to say. But no facts of this description, nor even an assumed state of the law by this Court for eighteen years (if Mr. Justice O'Brien is right in thinking that it was so assumed), can justify me in now putting a construction upon these Tithe Composition Acts which, in my clear opinion, they could not have borne at the time when they were passed. In *Hamilton* v. *Baker* (1), decided by the House of Lords in 1889, the question arose whether a decision of the Court of Admiralty (2), made in 1865, was correct.

(1) 14 App. Cas. 209. (2) *Re "The Mary Anne,"* L. R. 1 Adm. & Ecc. 8.

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That decision was that the Merchant Shipping Act of 1861 had created a maritime lien on a ship for disbursements, and conferred upon the Court of Admiralty a jurisdiction *in rem* in a suit for their recovery. It had been acted upon for twenty-four years, during which time the Admiralty Court of Great Britain had, under that assumed jurisdiction, made it its practice to detain ships of other nationalities to answer these claims for disbursements. The disastrous results of a determination that such a jurisdiction did not exist were strongly pressed upon the House; but their lordships held, reversing the decision of the Court of Appeal, that the function of remedying any inconvenience which might arise under such circumstances rested with the Legislature only, and not with them. Lord Macnaghten in expressing his opinion, uses words which will commend themselves to every lawyer: "I am satisfied," he says, "of the inconvenience of disturbing a course of practice which has continued unchallenged for such a length of time, and which has been sanctioned by such high authority; but if it is really founded upon an erroneous construction of an Act of Parliament, there is no principle which precludes your lordships from correcting the error. To hold that the matter is not open to review would be to give the effect of legislation to a decision contrary to the intention of the Legislature, merely because it has happened, for some reason or other, to remain unchallenged for a certain length of time." These words apply with even greater force to the present case.

The decision in *Hamilton* v. *Baker* (1) was immediately followed by a short Act of Parliament which removed the difficulty. Whether that example will or will not be followed, in the event of the higher tribunal, to which I apprehend this case will go, adopting the views I have expressed, I cannot pretend to say; but I feel that I am but following the unanimous opinion of the House of Lords in declining to allow my clear opinion upon a question of construction to be affected by circumstances subsequent in date to the statute under consideration.

As to the second question argued before us, viz. that of the date from which the altered composition, or the rentcharge in lieu

(1) 14 App. Cas. 209.

of it, should run, in my opinion it does not arise, and I do not offer any opinion upon it.

Mr. Justice O'Brien has glanced at the question whether, in a case of this description, this Court has a discretion to refuse the writ of *certiorari*, although it be of opinion, as I am in the present case, that the order sought to be brought up was wholly without jurisdiction. He did not express a definite opinion upon that question, nor was it necessary that he should do so, as, in his view, the order was within jurisdiction. Being of opinion, however, as I am, that the order is void, I am bound to decide it. It is therefore my duty to express my strong conviction that this Court would introduce uncertainty and error into the exercise of one of its most important jurisdictions, if in a case where, as here, an individual has been aggrieved by the decision of an inferior tribunal, made without jurisdiction, we were to permit any process of reasoning, or any consideration of resulting inconvenience, to induce us to give any colour to the idea that we had a discretion to refuse, at the suit of the party so aggrieved, redress for this proved wrong. I regard that question as conclusively determined by the considered judgment of the Queen's Bench in *The Queen* v. *Justices of Surrey* (1) which was approved of by the House of Lords in *Julius* v. *Bishop of Oxford* (2). "In other cases," *i.e.*, where the party has not, by his conduct, precluded himself from taking an objection, "where the application is by the party grieved, so as to answer the same purpose as a writ of error, we think it ought to be treated like a writ of error, as *ex debito justitiae*. But where the applicant is not a party grieved (who substantially brings error to redress his private wrong), but comes forward as one of the general public, having no particular interest in the matter, the Court has a discretion; and if it thinks that no good would be done to the public by quashing the order, it is not bound to grant it at the instance of such a person." The same distinction was, as pointed out by Lord Blackburn, taken so far back as *Arthur* v. *Commissioners of Sewers* (3).

I am aware that there have been some *dicta*, or, perhaps, even decisions of this Court not wholly consistent with this view; but

(1) L. R. 5 Q. B. 466. (2) 5 App. Cas. 246. (3) 8 Mad. 331.

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the judgments of the Lord Chief Justice, Mr. Justice Johnson, and Mr. Justice Madden in *The Queen* v. *Drury* (1), adopt the reasons in *Regina* v. *Justices of Surrey* (2), and make it the basis of their decision.

In the present case, the application is by the rentcharge owner, the person grieved. He has made this application, to remove from the records of the inferior Court an adjudication made without jurisdiction, which, so long as it remains there, although in law void, can be so used, in every proceeding to recover his just demand, as to cause him annoyance and incalculable expense. Holding, then, the view, that I do of the construction of the Act, I am of opinion that it is not competent to me to refuse the writ.

SIR P. O'BRIEN, L. C. J.:—

On the first argument of this case, before we had the advantage of my Lord Chief Baron's presence, I had formed the opinion that Mr. Ronan's contention was well founded, inasmuch as the *Gazette* did not state an average price, or supply any materials by which a true average price could be ascertained. I still retain that opinion, and entirely agree with the conclusion expressed by the Lord Chief Baron.

The Court being equally divided, no rule was made upon the application.

A. E. R. J.

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The applicant appealed to the Court of Appeal (Lord Ashbourne, C., FitzGibbon, Walker, and Holmes, L. JJ.).

Ronan, Q.C., and *A. C. Meredith* (with them *Henry, Q.C.*), for the appellant.

Matheson, Q.C., and *Chaytor* (with them *J. H. Campbell, Q.C.*), for the respondent.

Cur. adv. vult.

(1) [1894] Ir. R. 499, 525. (2) L. R. 5 Q. B. 466.

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LORD ASHBOURNE, C. :—

This is an appeal from an order of the Queen's Bench Division, making no rule on an application to make absolute a conditional order for a writ of *certiorari* to bring up and quash an order of the Justices, dated the 20th November, 1896, varying and reducing the tithe rentcharge of the parish.

The substantial ground put forward to impugn the order is, that the revision could only be made with reference to average prices published in the *Dublin Gazette*, and that as since 1887 that *Gazette* had ceased to publish any statement of average corn prices, or materials from which the averages could be deduced, it was impossible to comply with the statute, and therefore there could be now no revision.

It appears that for a vast number of years average prices had been regularly published in the *Dublin Gazette*, but that from 1887, without any apparent cause, the column of "Averages" was left blank. Attention having been directed to this, it was argued before the Court of Quarter Sessions that, there being no average prices published in the *Dublin Gazette* for the last seven years, there could be no revision. That Court, however, held that they had materials in the *Gazette* and evidence before them to justify the order for revision they pronounced. On the order being brought by *certiorari* before the Queen's Bench Division, the learned Judges who heard the arguments were equally divided, and the order therefore remained, and has now been brought before us on appeal from the Queen's Bench Division. The case is important, but the point for decision is very short and very simple.

By sect. 32 of the 1 & 2 Vict. c. 109, it is enacted that upon the notice of the application to vary "all such and the like proceedings shall be had as by the provisions of the said several Acts for establishing compositions for tithes in Ireland authorized and directed in the case of applications thereunder, and such compositions shall be increased or diminished, and the applotment thereof amended accordingly, and the rentcharges in lieu thereof increased or diminished in like proportion."

The first of these Tithe Composition Acts is Goulburn's Act, 4 Geo. 4, c. 99, but it is not necessary to go in any detail into its provisions, and it will suffice to mention Stanley's Act, 2 & 3 Wm. 4,

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c. 119, which made compositions perpetual. The 6th section of this last-mentioned Act provided that certain compositions, of which this is one, should be subject to variation in every seventh year, and then used these words—"Provided that the amount of all compositions shall be increased or diminished with reference to the average price of corn advertised in the *Dublin Gazette* during the seven years immediately preceding, and not otherwise."

What is the effect of the *Dublin Gazette* not having published any average price of corn during the past seven years on the application to vary? Is it possible to get over the blank left in the columns for average prices? Are there any materials from which any average can be inferred, or manufactured, or spelt out? If there was any average price stated and advertised in the *Dublin Gazette*, if the old practice had been adhered to, I for one would not have been astute to go further, and would have been ready to hold that the revision might proceed. But although most reluctant to yield to the objection, I feel unable to avoid doing so, in the face of the clear words of the statute. There are neither average prices stated nor any material from which they can be inferred, and therefore I think that the magistrates were without warrant to proceed with the revision.

As to the argument that this was not an order which could be reached by *certiorari*, I am of opinion that it has no validity. It is only in Goulburn's Act that any section appears taking away the right to examine orders on *certiorari*; but I prefer going on the broad ground that the order of the Court of Quarter Sessions necessarily refers to and is founded upon the *Gazette* and its advertisement of average prices. Therefore, on the application to examine the order on *certiorari*, we are at liberty to see and consider the *Gazette*, and, doing so, it shows a blank in a vital column, and therefore shows that the order made by the Court of Quarter Sessions cannot be sustained.

In my opinion the order must be quashed, and that will be the order of the Court, the counsel for the respondents not requiring any further proceeding to be taken.

FITZ GIBBON, L.J. :—

To the contention that *certiorari* does not lie, there are three answers. First, Goulburn's Act, which provided (sect. 57) that proceedings by Justices under that Act should not be removed by *certiorari*, was superseded by Stanley's Act which contained no such provision, and was repealed, as spent, by the Statute Law Revision Act, 1873. Though a statute *in pari materia* may sometimes import, as it were, procedure provisions from a previous existing Act, none of the authorities cited go so far as to hold that a disabling provision affecting a prior or superseded procedure will be extended to a substituted or amended procedure, to which it is not attached by any express enactment. The case of *Ward* v. *Stevenson* (1), which we recently had to consider, is an instance to the contrary, and I am not satisfied that, in proceedings under Stanley's Act, the right of *certiorari* was taken away *ab initio* by importing the provision to that effect from Goulburn's Act.

Secondly, the order now under review refers upon its face to the *Dublin Gazette* and the advertisements published therein, as the foundation of the order, and it is settled law that where an order purports to state the foundation of the jurisdiction, the foundation so stated may be examined on *certiorari*, and if it can be displaced, the order is bad on its face.

Lastly, I think that the absence of jurisdiction is shown on a higher ground. The average prices of corn, as advertised in the *Dublin Gazette*, are not merely *evidence*; they are rather the *subject-matter*, and the essential condition, of the Justices' jurisdiction. The jurisdiction is to make an arithmetical calculation upon prescribed *data*. The advertised prices are part of these necessary *data*, and unless they are forthcoming, the calculation can not be made. The absence of jurisdiction in the Justices to proceed without the statutory *data*, seems to me to be as clear as would be the absence of jurisdiction in a coroner who proceeded to hold an inquest without a corpse.

There was no subject-matter for the jurisdiction unless there were in existence average prices advertised in the *Gazette*. In my opinion, the question is whether such prices are to be found in

(1) 1 New Sess. Cas. 162.

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the *Gazette*, or can be made out from anything advertised therein. The Irish statutes leave no doubt as to the meaning of the words "average price." An average price is not the arithmetical mean between the *maximum* and the *minimum* prices, because the quantity sold at each price, as well as the several prices at which sales are made, must be taken into account in ascertaining the average.

A reference to the *Gazette*, in each of the forms in which an "average price" was advertised, shows that the arithmetical mean between the highest and lowest prices did not usually, or even often, appear as the average price, and the difference is often very considerable. Even if what purported to be the "average price" had frequently, or even always, corresponded with the mean price, it would not necessarily be wrong, for if equal quantities be sold at each of two prices, the mean price and the average price must be the same. The coincidence would be ground of suspicion that the average had not been correctly calculated, but no more. But wherever there is even the smallest variation—and there are many instances of considerable variations—between the mean price and the "average price," as published, some calculation purporting to ascertain the average, as distinguished from the mean, must have been made, and if the average appears in the *Gazette*, I hold that its correctness cannot be challenged. Furthermore, if I thought that any real calculation of averages had been actually made, now or at any future time, I should look with eager eyes, and listen with willing ears, for anything, printed or said, from which I could hold that such average was to be found in, or could be made out from, anything advertised in the *Gazette*, and I would not go behind the advertisement. But from the time when the average price column was left vacant, and the highest and lowest prices only appeared, and so long as nothing more is in the advertisement, the machinery became, and is, radically defective, and the materials for the only calculation which the Justices had jurisdiction to make do not exist.

I cannot follow Mr. Justice Johnson when he says:—"As materials are to be found in the *Gazette* to which alone reference is to be made, I think it is more reasonable to conclude that *the Legislature intended those materials to be adopted and used by the*

Justices in the only way in which they could be used, and were used in the present case, and have for many years been adopted and used by the Justices at Quarter Sessions, on applications from time to time to vary tithe rentcharge." This involves an inversion of time. The intention of the Legislature must be gathered from the Acts of Parliament, as applied to the circumstances and the materials existing at the time when they were passsd. The materials then in existence supplied average prices, and the *subsequent* neglect or failure, on the part of those who published the *Gazette*, to supply those materials, cannot warrant the conclusion that the Legislature intended that insufficient materials might be "adopted and used," instead of those required by the statute. It might equally be said that the Legislature intended the Justices to continue to fix average prices anyhow they pleased, without any reference to the *Gazette*, if the *Gazette* had ceased to publish anything whatever on the subject.

Mr. Justice O'Brien rests his judgment upon a different ground, which I cannot adopt. "The prices (he says) *are advertised* in the *Gazette*. They are *stated to be the average prices*. If there are two sets of prices, or if the return be ambiguous, or if it be admitted that they are *maximum* and *minimum* prices, it is competent to the Justices, in my opinion, to *accept the mean of those prices*. Whatever it be, it is the *Dublin Gazette's description of the average*. The Justices have authority to apply the statement, but not to contradict it." In the earlier *Gazettes*, the variations between the arithmetical mean and the price published as the weekly average price, differ very much, sometimes by as much as a quarter, and even a third, and down to 1877 the *Gazette* not only purports to give an average price as distinguished from the mean price, but shows that the two prices are not the same. From 1887 the *Dublin Gazette* gives no "description of the average," and contains nothing from which it can be calculated. It is not "competent to accept the mean," and it is not "stated to be the average." It would be most unjust to make the variation of tithe rentcharge depend upon the accident of some one or two barrels, say of inferior or damaged corn, being sold for a fraction of the current price, or, *e contra*, upon some fancy price obtained, say for a barrel or two of exceptionally excellent or valuable seed. I find

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the *minimum* price, in many instances, less than half the *maximum*. How is O'Brien, J., justified in concluding that these extremes "are stated to be the average prices," and how does the law enable the Justices "to accept the mean of those prices," which may differ from the average by anything short of 50 per cent.?

If the average prices had been published, I should have accepted them. If the total quantities sold, and the total prices realized, had been published, the average might have been worked out. But so long as the highest and lowest prices only are known—even with either the total prices or the total quantity, one or other, but not both—the materials arithmetically necessary for the calculation of the average price do not exist. Mr. Justice O'Brien says that it is a question "of the restrictions that the laws of nature put on legal power by the irresistible effects of time." With all respect, neither time nor nature can put a publication into the *Dublin Gazette*, and the irresistible effect of the absence of the necessary *data* is that the Justices cannot make the only arithmetical calculation which they have jurisdiction to make.

WALKER, L. J.:—

I concur, and I confine myself mainly to the ground of the two judgments of the two Judges who upheld the order. Irrespective of the question whether the statement of an average in the *Dublin Gazette* is sufficient, though it be not the average contemplated by the Tithe Acts, it is, I think, obvious that the average price contemplated by these Acts is not the mean price.

When Stanley's Act—2 & 3 Wm. 4, c. 119—was passed, there was in existence a subject for comparison—an average price as advertised in the *Dublin Gazette* for seven years before 1821. That was the true average and not the mean. The basis for revision should clearly be the same; otherwise there could be no true comparison—no mode of finding out whether there was a rise or fall of one-tenth. A comparison of average price in the real sense with mean price must be untrue.

Now, the Corn Bounty Acts furnished materials for a weekly statement in the *Gazette* of the real average, and created a duty to state it, and contained a provision to meet the omission to discharge the duty.

A statement in the *Gazette* of a different character from what the Tithes Act contemplated grew up, and survived inaction under the Corn Bounty Acts. It was adopted for a long period before 1879, and was in existence in 1879 when the Corn Bounty Acts were specifically repealed, and it continued to 1887.

If the practice had continued after 1887 we should have had a different question to decide, because there would be a statement of the average price of corn advertised in the *Dublin Gazette*, though extrinsic examination might show it to be a mean price, and not what was intended to be adopted as the standard.

Can there be any such conclusion against the reality when the average column is left blank? If we fill it for ourselves, without there being a statement of average from the only materials to hand, we must fill in a figure which is not the average under the Tithes Act.

An erroneous statement actually made may bind, but an absence of statement when we know what truly ought to appear cannot be inferred to be the same as an erroneous express statement. The true inference would seem to be that it was not filled up, because it could not.

Mr. Justice Johnson, after a very full examination of the statutes, mainly founded his conclusions upon the repeal in 1879 of the Corn Bounty Acts, and the fact that the Legislature did not deem it necessary to enact any new or other provisions for variation of the tithe rentcharge, or to interfere with, or regulate, or control the advertisements. But there was then in existence a form of publication which stated an average, and if it had continued the repeal might be pressed into service to support it. But it could not help every new departure in error, or support an order when the *Gazette* was absolutely silent.

Mr. Justice Johnson then bases his judgment on the conclusion that the average price of corn is now advertised in the *Gazette*, and that materials are to be found in the *Gazette*; but there I cannot follow him.

Mr. Justice O'Brien practically takes the same view as Mr. Justice Johnson, while admitting that there could be no revision if the *Gazette* were a blank, or there were no *Gazettes*.

I think the *Gazette* is a blank as to the necessary statutory standard of comparison.

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Upon the other questions I am not satisfied that the *certiorari*, under the existing statutes, is taken away; but I am clearly of opinion that the order of the Justices is bad on the face of it. They make the *Dublin Gazette* the basis of their order for the comparison and revision which they direct—the statutable sum they were to make out. It is incorrect to describe the *Gazette* as evidence on the conclusions of fact they were to draw as Justices.

In this respect the case is like the *Overseers of Walsall* v. *L. & N.-W. Railway* (1), when the order of Quarter Sessions amended a rate setting out, as was usual in such cases, the grounds on which they acted; and therefore, as Lord Cairns points out, they could be looked at and the order quashed.

HOLMES, L. J. :—

Although this case is of great interest to the persons concerned, and may involve a principle important to others, the reasons for my judgment can be stated very briefly.

The tithe rentcharge, which was substituted for tithes in the year 1838, was made subject to a septennial revision, to be carried out in the same manner as compositions for tithes were theretofore increased or diminished. The tribunal to which this duty was entrusted was the Court of Quarter Sessions, whose jurisdiction is carefully defined and limited. The provisions on the subject are to be found in the 43rd section of Goulburn's Act, the 23rd and 24th sections of the amending Act of the following year, and the 6th section of Stanley's Act. These enactments prescribe the time at which the application is to be made, the notices that are to precede it, and the mode in which the Court is to perform the duty. Its function is confined to the comparison of one figure with another, and by an arithmetical process based on this comparison it is to arrive at the result. One of the figures is the price of corn as stated in the certificate of composition: the other is the average price of corn as advertised in the *Dublin Gazette* during the seven years immediately preceding. If the certificate does not state the price, the average price of corn for the period with reference to which the composition has been calculated is to be ascertained from the *Gazette* by the Justices; but no provision is made to supply an omission of the average price from the *Gazette*.

(1) 4 App. Cas. 30.

Down to the year 1873 the *Dublin Gazette* contained periodically not only a statement of the average price of corn, but materials from which the true average price for seven or any other number of years could have been ascertained. The judgments in the Queen's Bench Division enter minutely into a consideration of the legislation under which these statements were published. The state of the law at the time the Tithe Composition Acts were passed accounts for the average price of corn as advertised in the *Gazette* being made the basis of the revision; but it is comparatively unimportant what led to the enactments dealing with this subject. It is enough that they exist, and that tithe rentcharge cannot be varied except in accordance with them. I have already said that down to the year 1873 there appeared in the *Gazette* periodically statements of the average prices, and materials from which a true average for any past term of years could be ascertained. From 1873 to 1887 the form of the announcement was altered. There still appeared the average price, and it was easy to calculate the mean of these averages for any given period; but there were no longer to be found in the document materials for calculating a true average for such period. Since 1887 the average price is no longer stated. The column purporting to set it forth has been left a blank, and no materials are given by means of which the blank can be supplied. I offer no opinion as to what would amount to a proper or sufficient mode of advertising an average price, so as to enable the calculation required by the statutes to be made. This has been considered very fully and carefully by the Lord Chief Baron; but Mr. Ronan declined to discuss it in this Court, not because he doubted the conclusion arrived at by Palles, C. B., but because the interests of his client did not require him to do so. He takes his stand upon the proposition that, in the absence of any statement of average price, and of materials from which any average price can be ascertained, it is impossible for the Court of Quarter Sessions to exercise the only jurisdiction conferred on it. With this I agree. I am of opinion that, as soon as it appeared to the Justices that no average prices had been advertised in the *Gazette* during the last septennial period, they ought to have ceased from further inquiry, and declined to make an order.

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It has been argued that notwithstanding the order has been made illegally, it cannot be quashed by means of a writ of *certiorari*, inasmuch as the 57th section of Goulburn's Act provides that no proceeding touching or concerning any of the matters in that Act contained shall be removed or removable by *certiorari* into any Court of Record. A similar provision is not unusual in other statutes; but it has never been held to take away the authority of the Court of Queen's Bench, or the Queen's Bench Division to restrain inferior tribunals from acting wholly without jurisdiction. Many orders at Quarter Sessions purporting to vary the amount of tithe rent-charge have been quashed on the ground that the conditions as to time, or notice necessary to confer jurisdiction had not been fulfilled; and I apprehend that this was done quite irrespective of whether the 57th section applied to these orders or not. The existence of average prices advertised in the *Gazette* is just as necessary a condition to the Justices varying the tithe rentcharge as the service of the prescribed notices; and a writ of *certiorari* may be employed to enforce the observance of the one as well as of the other.

I would not hesitate to come to this conclusion even if I were of opinion that the 57th section of Goulburn's Act applies to the present order. I am of opinion, however, that this is not so. The Act of 1838 establishing tithe rentcharge in lieu of tithes is a new departure in legislature superseding the Tithe Composition Acts which have been long since repealed. The periodic increase or decrease of the rentcharge is provided for by adopting the machinery that previously existed for varying tithe compositions; but there is nothing that can be construed as incorporating a section general in its provisions, and having no special connexion with this portion of the code.

For these reasons I hold that the writ of *certiorari* ought to issue. It will be observed that I have avoided expressing an opinion on, or even referring to, some matters which were mentioned during the argument. I have done so advisedly, as they do not concern the present parties, and will probably be the subject of future litigation.

Solicitor for the tithe owner: *J. C. Sullivan.*

Solicitors for the tithe payer: *Montgomery & Chaytor.*

G. Y. D.

IN RE RICHARD DOWNES (1).

Appeal. 1898. May 12.

Bankruptcy (Ireland) Amendment Act, 1872 (35 & 36 *Vict. c.* 58), *s.* 52—*Settlement in consideration of marriage—Settlement in favour of purchaser or incumbrancer—Valuable consideration—Marriage of collateral relative.*

By the 52nd section of the Bankruptcy (Ireland) Amendment Act, 1872, settlements made before and in consideration of marriage are *inter alia* excepted from the settlements avoided by the section:—

Held, that the exception is not confined to settlements made on the marriage of the settlor.

APPEAL by Patrick King from the decision of Boyd, J., reported, *ante*, p. 302, where the facts are fully stated.

Ignatius O'Brien, for the appellant.

Serjeant Dodd, and *Blood*, for the respondents.

WALKER, L.J., delivered the judgment of the Court:—

In this case an interesting question of general application arises as to the true construction of the 52nd section of the Bankrupt Act, 1872.

Richard Downes, a trader, was on the 3rd December, 1896, in insolvent circumstances. He was unmarried, but had a sister named Catherine who assisted him in his business; she was engaged to be married to one Patrick King, and in consideration of the marriage Downes executed a deed charging his licensed premises with a sum of £100 payable to King by certain instalments. Downes was adjudicated a bankrupt on the 29th June, 1897.

Mr. Justice Boyd appears to have come to the conclusion that King had notice, before the marriage, of Downes' insolvent circum-

(1) Before LORD ASHBOURNE, C., and FITZ GIBBON, WALKER, and HOLMES, L. JJ.

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stances. This question was material if the rights of King depended on the second saving in the 52nd section—that to a purchaser in good faith—but in the view we take of the section his rights are protected by the first saving; but I do not think there is any ground for the learned Judge's conclusion of fact. King was willing himself to take a promissory note for the £100 payable by instalments, and his question to Ryan "were they solvent" appears a very natural one. It was Mr. Ryan suggested there ought to be a deed of charge, which was the advice any solicitor who knew his business would give, and I cannot find the least foundation for the suggestion that Mr. Ryan had any desire to remove the property from the reach of the creditors.

The assignees contended, 1st, that the settlement is void against them under the 52nd section irrespective of the circumstances of the settlor; and, 2nd, that the Court could under the 314th section of the Bankruptcy Act of 1857 order the charge to be realized for the benefit of the creditors if it was a security within that section, inasmuch as the bankrupt was at its date in insolvent circumstances.

At the date of the passing of the Act of 1872 the creditors had a right under the Irish statute, analogous to the 13 Eliz. c. 5 in England, to set aside deeds if made with intent to defeat, delay or defraud creditors, but such deeds were protected if made *bona fide* and for good consideration, which included marriage. The consideration of marriage has been described as the "best that can be," and the "highest known to the law." For those within the marriage consideration it is valuable against all persons. There is no measure of such consideration by a pecuniary value. The 314th section of the Act of 1857 is the same as existed in England from the time of the Bankrupt Act of James 1, and it was part of the bankrupt code in Ireland from at all events the 11 & 12 Geo. 3, c. 8. The section enacts "If any bankrupt or insolvent, being at the time in insolvent circumstances, shall (except upon the marriage of any of his children, or for some valuable consideration) have conveyed, assigned, or transferred to any of his children, or to any other person, any hereditaments, offices, fees, annuities, leases, goods or chattels, or have delivered or made over to any such persons any bills, bonds, notes or other

securities, or have transferred his debts to any other person or into any other person's name, the Court shall have power to order the same to be sold and disposed of for the benefit of the creditors: and every such sale shall be valid against the bankrupt or insolvent and such children or persons, and against all persons claiming under him."

It became necessary for the respondents' counsel during the argument to construe this section which is still in force in connexion with the 52nd section of the Act of 1872, and accordingly they contended that an antenuptial settlement on a wife or a grandchild was avoided by it, and though it was admitted a settlement on a wife had been always treated as valid, it was said this was through the discretionary power to order a sale which the section vests in the Court. I think, however, it is clear that a settlement on a wife is protected because it is for valuable consideration. No trace of any other ground appears in the decisions which protected a wife's antenuptial settlement: *Cadogan* v. *Kennett* (1); *Campion* v. *Cotton* (2). I think, the words "valuable consideration" have their ordinary legal meaning in the 314th section and not that given by force of the context to similar words in the 52nd section.

It would seem strange that a settlement by an insolvent man on a child should be protected under section 314, and a similar settlement by a solvent man on a grandchild avoided under the 52nd section, if bankruptcy occurred within two years. *Glaister* v. *Heiver* (3) was relied on, but that only decided that a voluntary settlement on a wife was bad within that section in the Act of James as she came within the description of "other person." It was not a settlement for valuable consideration. I think it is clear that the deed here is not affected by the 314th section which was directed against voluntary settlements. The Act of 1872 in Ireland and the Act of 1869 in England introduced new provisions for the benefit of creditors, and those provisions made certain settlements executed by solvent traders (and in England since 1883 by solvent non-traders) void if the settlor became bankrupt within two years.

(1) Cowp. 432. (2) 17 Ves. 271. (3) 8 Ves. 196.

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The question is what are those settlements, and what are the ones saved by those highly penal clauses? The respondents' counsel contend that the only settlements saved are the antenuptial ones executed in favour of the wife of the trader—a conclusion which they arrive at by reading "in consideration of marriage," "consideration of his marriage." This argument is not easy to reconcile in Ireland, with the existence of section 314, which protects antenuptial settlements on children by even an insolvent settlor.

The section in England analogous to our 314th was repealed in 1869, and (as I understand the matter) the whole subject of voluntary settlements was dealt with by sect. 91 of the Act of 1869, as it is now by a similar section in the Act of 1883. In Ireland, perhaps by mistake, the 314th section was left operative, but this increases the difficulty of the assignees.

The 52nd section says:—"Any settlement of property made by a trader after the commencement of this Act, not being a settlement made before and in consideration of marriage, or made in favour of a purchaser, or incumbrancer, in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall if the settlor becomes bankrupt within two years after the date of such settlement be void as against the assignees."

The argument starts with the difficult operation of introducing "his" into a sentence which is grammatically clear; but the violence done to grammar is exceeded by that done to what, as I understand the case, was the real object or intention of the legislation.

The general words "consideration of marriage" are pointed to the consideration which marriage gives, and not to the person who marries, and though in two instances in the section the marriage dealt with must be the marriage of the trader, that is by force of the context. This appears clearly by the last case dealt with, "any covenant or contract made by a trader after the commencement of this Act, in consideration of marriage for the future settlement upon or for his wife and children." The marriage consideration is still left general, but the section in the case put limits the effect of a marriage consideration.

The object of the section was, in certain cases, to avoid voluntary settlements, and in some instances though they were made by solvent settlors. What are saved are those protected by a marriage consideration, which is in law valuable consideration, but not necessarily importing that any property is brought in on either side; and, secondly, it saves settlements and deeds in favour of a purchaser or incumbrancer in good faith and for valuable consideration. Those words, as interpreted in *Hance* v. *Harding* (1), mean where a *quid pro quo* is given, and this will often exist where the consideration is marriage, and thus the two descriptions may sometimes overlap, and the latter words will often protect post-nuptial settlements, as they did in *Hance* v. *Harding* (1) and in *In re Dale and Elsden* (2).

The construction of the section, which I think is the true one, limits its operation to voluntary settlements. It is a step in advance on the 314th section of the Act of 1857, but only deals with voluntary deeds, as that did.

The 29th section of the English Act of 1883 (46 & 47 Vict. c. 52), to which Lord Justice Holmes has referred us, entirely bears out this view. Section 29 is as follows:—"In either of the following cases, that is to say:—(*a*) In the case of a settlement made before and in consideration of marriage, where the settlor is not at the time of making the settlement able to pay all his debts, without the aid of the property comprised in the settlement; or (*b*) In the case of any covenant or contract made in consideration of marriage for the future settlement on or for the settlor's wife or children of any money or property wherein he had not at the date of his marriage any estate or interest (not being money or property of or in right of his wife); if the settlor is adjudged bankrupt or compounds or arranges with his creditors, and it appears to the Court that such settlement, covenant or contract was made in order to defeat or delay creditors, or was unjustifiable having regard to the state of the settlor's affairs at the time when it was made, the Court may refuse or suspend an order of discharge, &c."

(1) 20 Q. B. D. 732. (2) [1892] W. N. 55.

Appeal. 1898. *In re* Downes. Walker, L.J.

The settlement is not interfered with, but the settlor is punished. According to the argument "his" must be inserted before the word "marriage," and therefore no punishment would be provided for the making of a settlement on the marriage of any other person—a most strange result.

Surely one would have found not only in the Irish Act, but in the two English Acts of 1869 and 1883, the word "his," if the contention of the assignees is sound.

There may be sufficient in any Act to compel the Court to depart from the grammatical construction, but in this case investigation tends to support it and leave this 52nd section, what it was intended to be, a highly penal clause against voluntary settlements.

I think the appeal should be allowed.

Solicitor for the appellant: *P. Ryan.*

Solicitors for the assignees: *Bennett Thompson & MacLaughlin.*

G. Y. D.

REYNOLDS *v.* MOORE (1).

(1897. No. 1189.)

Q. B. Div. 1898. Feb. 10, 15 April 21.

Lease—Reservation of right of shooting to lessor, "his heirs and assigns, and his and their attendants, gamekeepers, and servants"—Licence to a stranger to shoot game on his own account.

The plaintiff was grantee of lands under a fee-farm grant, by which "free liberty" was reserved to the grantor, "his heirs and assigns, and his and their attendants, gamekeepers and servants, to hunt, fowl, fish, hawk, and set" in the demised premises. On the 2nd July, 1897, C. purchased, in the Court of the Land Judge, the grantor's interest in the rent and reservations mentioned in the grant. Before the conveyance was executed to him by the Land Judge, C., by letter, "authorised" the defendant "to shoot game" on the lands during the ensuing season; and the defendant with a party of friends and attendants entered and shot a hare.

On new trial motion:—

Held, that (even had the Court conveyance been executed) the re-grant of right of shooting did not entitle C. to permit a stranger to shoot game in his absence on such stranger's own account.

NEW TRIAL MOTION.

The following statement of the facts is taken from the judgment of Mr. Justice Andrews:—

This was an action, brought on the 27th October, 1897, for trespass *quare clausum fregit*, and killing game on the plaintiff's lands on the 12th of October, 1897. The defence was a justification (under an authority, given to the defendant by the alleged owner of a right of sporting over the lands) to enter and shoot game thereon.

By a lease of 1792, Thomas Connolly demised the lands in question to Henry Major for lives renewable for ever, reserving free liberty to the lessor, "his heirs and assigns, and his and their attendants, gamekeepers, and servants, to hunt, fowl, fish, hawk,

(1) Before SIR PETER O'BRIEN, L.C.J., and O'BRIEN and ANDREWS, JJ.

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and set, on the said demised premises, at all proper seasons." This lease was executed by both parties.

By a deed of 1891, William and Charles Tredennick, the then owners of the lease, obtained a grant from the then owners of the reversion, converting the tenure of the renewable lease into a tenure in fee under the Renewable Leasehold Conversion Act, 12 & 13 Vict. c. 105. This grant, which was executed by all the parties to it, contained the same reservation to the grantors, their heirs and assigns, as was contained in the renewable lease to the lessor, his heirs, and assigns.

The plaintiff Thomas Reynolds held the lands in question under the Tredennicks by virtue of a grant of 1893, which converted a renewable lease of 1835 into a tenure in fee under the same Act.

The rent and reservations in the grant of 1891 were put up for sale in the Court of the Land Judge in the Chancery Division of the High Court, and were purchased on the 2nd of July, 1897, by Henry J. Cooke, who duly paid his purchase-money on the 12th of the same month, but up to the commencement of the action had not obtained his conveyance.

Upon the 8th of October, 1897, in reply to a letter from the defendant, Leo Moore, of the 4th of October, 1897, asking for permission to shoot over the lands, Henry J. Cooke wrote a letter to the defendant, in which he said:—"I hereby authorize you to shoot game" on the lands (describing them) "for the season of 1897–1898."

The action was tried by Mr. Justice Gibson, without a jury. It appeared from the evidence that the defendant, with his sister, and Mr. Brady, a friend, all with guns, accompanied by attendants, gamekeepers, and dogs, came on the lands on the 12th October, and, as the learned Judge found, shot a hare, and, as was admitted, also shot a brace of pheasants. It was not contended, having regard to the terms of the reservation of the right of sporting, that the shooting of the hare could be justified, and the Judge gave judgment for the plaintiff for two shillings and six pence, in respect of the shooting of the hare, and for six pence in respect of the shooting of the pheasants; and, as the Judge thought that the defendant was not aware that the plaintiff intended to sue for

shooting the hare, and only intended to justify in respect of the pheasants, he limited his certificate, entitling the plaintiff to costs, to the cause of action which related to entering and killing the pheasants.

The defendant then served notice of motion to set aside the Judge's verdict and certificates in relation to the last-mentioned cause of action.

Price, Q.C., *Henry*, Q.C., and *Patchell*, for the defendant.

Wylie, Q.C., and *Gallagher*, for the plaintiff.

The following authorities were referred to—on the construction of the clause in the lease of 1792, and grant of 1891: *Wickham* v. *Hawker* (1); *Hudson* v. *Foott* (2); *Gardiner* v. *Colyer* (3); *Ewart* v. *Graham* (4); *Metcalfe* v. *Westaway* (5); *Hill* v. *Walker* (6); *Baker* v. *Berkeley* (7); *Doe* d. *Douglas* v. *Lock* (8): *Finlay* v. *Curtis* (9); *Moore* v. *Earl of Plymouth* (10); *Irwin* v. *Osborne* (11)—and, on the rights of a purchaser in the Court of the Land Judges pending execution of the conveyance to him, and the effect of the proceedings in that Court—Rules 30 and 32 of the Landed Estates Court Rules of 1859; the Landed Estates Court Act, 1858 (21 & 22 Vict. c. 72), sect. 87; *Bayley* v. *Conyngham* (12); *Hamilton* v. *Musgrove* (13); *Corcor* v. *Payne* (14); *Martin* v. *Kennedy* (15); *Sexton* v. *M'Grath* (16).

Cur. adv. vult.

April 21.

SIR P. O'BRIEN, L. C. J.:—

This case turns on the construction of a certain reservation contained in a renewable lease made in 1792 by Thomas Connolly to Henry Major, and of a like reservation in a deed of 1891, by which the estate and interest in the lease of 1792 was converted

(1) 7 M. & W. 63.
(2) 9 Ir. C. L. R. 203; 10 Ir. C. L. R. 509.
(3) 12 W. R. 979.
(4) 7 H. L. Cas. 331.
(5) 17 C. B. (N. S.) 658.
(6) Peake's Add. Cas. 234.
(7) 3 C. & P. 32.
(8) 2 A. & E. 705.
(9) Hayes, at p. 500.
(10) 7 Taunt. 614.
(11) 25 Ir. L. T. R. 36.
(12) 15 Ir. C. L. R. 406.
(13) Ir. R. 6 C. L. 129.
(14) Ir. R. 4 C. L. 380.
(15) 2 B. & P. 69.
(16) Ir. R. 6 Eq. 381.

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into a tenure in fee. The lease of 1792 demised the lands for lives renewable for ever, and contained a reservation in the words following:—"Reserving free liberty to the lessor, his heirs and assigns, and his and their attendants, gamekeepers, and servants, to hunt, fowl, fish, hawk, and set on the said demised premises at all proper seasons."

The interest in this lease became vested in William and Charles Tredennick, and, by a deed of 1891, they obtained under the Renewable Leasehold Conversion Act, a grant of a tenure in fee from the then owners of the reversion. Both the lease of 1792 and the deed of 1891 were executed by the lessee and the grantees respectively. The plaintiff Thomas Reynolds holds under the Tredennicks. By a lease of 1835 they had demised the lands in question to him for lives renewable for ever; and this renewable interest was converted into a tenure in fee by a grant of 1893, also made pursuant to the provisions of the Renewable Leasehold Conversion Act.

The interest in the rent under, and the reservations in, the grant of 1891, were purchased at a sale in the Land Judge's Court on the 2nd July, 1897, by Mr. Henry J. Cooke, who, however, at the date of action brought had not obtained his conveyance; and Mr. Moore, the defendant in the present action, justifies his trespass by alleging the authority given to him by Mr. Cooke by letter of the 8th October, 1897, authorizing him to shoot game on the lands during the ensuing season.

There can, I think, be no doubt that the reservation in the lease of 1792, and in the grant of 1891, operated as a re-grant of a *profit a prendre*—of a re-grant, in fact, of a right of sporting; and the question, or at the least the main question before us is the character and limit of that right. It is admitted to be a concurrent right. It was in my judgment the grant of a *profit a prendre* in fee simple, limited to the grantee in fee-simple, his attendants, gamekeepers and servants. That is to say, the taking of the profit was limited to the grantee, or his heir, if it descended to him, or his assign, if it has been granted or has passed to an assign, with his or their attendants, gamekeepers and servants. In other words, the owner for the time being of the *profit a prendre* might take the profit, that is to say the game, by

himself, or with his attendants, gamekeepers, and servants; or his servants might, according to *Wickham* v. *Hawker* (1), and *Hudson* v. *Foott* (2), take the game, provided they did so with the authority and for the benefit of the owner in fee.

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That the particular liberty to take game operated as a grant of a *profit a prendre* I think is clearly settled by the case of *Wickham* v. *Hawker* (1); and I do not feel myself at liberty to question the authority of that case. That the right of sporting was a concurrent one is, as I have already stated, admitted. This could not be denied. It was not a reservation of *all* the game, nor of the *exclusive* right to take the game, nor was it a reservation of a right to take game by all such persons as the grantee of the right should from time to time authorize or license to take it.

This being so, the case appears to me to be quite plain. Cooke could not grant permission to a stranger to take game. If his servants took and killed game in his absence, their doing so could be justified only by showing that the game was killed and taken for his benefit and by his authority.

Feeling the difficulty presented by the concurrent limited character of the right re-granted, Mr. Henry contended—indeed it was his main contention—that the letter of October, 1897, from Cooke to Moore, operated as an assignment *pro tanto* of Cooke's right. This, in my opinion, was plainly not so. He got what he asked for—permission to shoot for the season. The letter of October, 1897, gave a mere licence, and as it was a licence to a stranger, it was wholly unauthorised by the right that was in Cooke. The defendant was unjustified in what he did, and the verdict must stand.

I have dealt with this case as if a Landed Estates Court conveyance had been actually executed to Cooke when he gave the licence to Moore—in no case would the reservation or re-grant warrant a licence to a stranger—but I am not to be taken as deciding that a person who has been declared a purchaser in the Landed Estates Court stands in reference to such a matter as the one before us in the same position as a person to whom a conveyance has been executed. As far as my judgment is concerned, that question remains absolutely open.

(1) 7 M. & W. 63. (2) 9 Ir. C. L. R. 203.

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O'BRIEN, J. :—

Though much of the argument turned upon the fact that the Landed Estates Court conveyance had not been in fact executed when the acts complained of were done, it is clear that even if that conveyance had been executed, the question would still remain as to the circumstances under which the right of shooting was to be exercised. The clause in this deed of 1891, following the clause in the earlier renewable lease, certainly might involve some difficulty, owing to its peculiar frame; though, in accordance with the rule of conveyancing in this country—the words being substantially the same as in the case of *Hudson* v. *Foott* — I should have been of opinion, on the first view, that this could only be a concurrent right; but it is possible that something may still be said upon this; and there are some cases referred to in Mr. Longfield's book, which I have not had an opportunity of looking into, which may have some bearing upon the matter, as supporting the argument whether there could be an exclusive right at all, having regard to the nature of the grant and to the fact that it appears under the heading of exception or reservation—even giving full force to that idea first propounded by Lord Wensleydale, that it must be taken as a clause of re-grant in all cases—which, if followed out, and applied in all cases, will lead to certain absurdities.

Upon the main question, I must confess that I was much struck by the contention that Mr. Cooke, the purchaser, was, under the Rules of the Land Judges' Court, to be held to be for all purposes assignee either of the rent or of this right, pending the execution of the conveyance; and there may also be a difficulty in giving effect to Mr. Wylie's argument that the right may be granted in gross—that Mr. Cooke may part with the rent and still keep the right of shooting in gross in his own hands. However, it would occur to me that Mr. Cooke was not assignee for all purposes, before the conveyance was executed. The rule that the estate is to be deemed the property of the purchaser was never held to extend further than to give the purchaser a right to the lands in the hands of the receiver, or of the Court. It certainly never was held to extend so far as to give him a right to sue in his own name. If he sued he must sue in his own name as

owner, and if he alleged a right as assignee or grantee of the rent or the reversion, I apprehend that he could be defeated upon the ground that no conveyance had been actually made to him. Mr. Price, with his great knowledge of the practice of the Courts of Equity and of conveyancing, seemed to consider that a purchaser in the Land Judge's Court, and a private purchaser—a purchaser in the Court of Chancery—would be in the same position; but I think grave doubt exists as to this; for that Court does not follow the rules of the Common Law or the rules of the old Courts of Equity. The conveyance is not made as it is made in the Court of Chancery where an owner refuses to execute the deed himself; but it is made in all cases not by the owner but by the Court itself of its own paramount authority; and the whole machinery and control of the Landed Estates Court show that all its provisions in regard to an estate are preparatory to the final act, the conveyance. It may be that even if the purchase-money were paid into Court, and under the absolute disposal of the Court, still the conveyance might not be made at all, and in that case there might be, as Mr. Henry said, an equitable assignee of the estate, while the legal estate would be outstanding and could be conveyed to another person. However, it seems to me that the conveyance is a necessary part of the machinery, and the only mode of extinguishing former rights, and that there is enormous difficulty in making out that Mr. Cooke could be assignee for all purposes until the conveyance was made to him. If he was the owner of the rent for all purposes he could sue for the rent in his own name. Then the further difficulty arises, assuming this right to be vested in him, how is he to transfer it to another? This is a grant of something entirely distinct from an estate—it is a grant of a liberty, which it may be conceded is not, according to the distinction made in some cases, a mere licence of pleasure, but a profit. Take it now as not a licence of pleasure but as a profit—strictly so speaking, it is limited to a certain class—to the grantor in the grant, his heirs and assigns. Of course with his usual acuteness Mr. Henry saw that his difficulty was in the final stage of the case—in making out that Mr. Moore was assignee of the shooting, for he appeared to abandon the argument that a mere licensee could exercise the right in this case. He therefore con-

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O'Brien, J.

tended that Mr. Moore was assignee of Mr. Cooke; but here there is a difficulty, a great difficulty, not at all of a technical kind, nor turning upon the terms of the conveyance, nor upon the construction of this letter, but arising out of the Common Law. Suppose this a concurrent right, concurring with the right of the grantee—supposing, in other words, that Reynolds may shoot too over these lands, can Cooke bring in an army of people who might eat up all the game on the place, and leave nothing for the person by whom the concurrent right is to be exercised? This consideration shows that such an idea would be fatal to the existence of any concurrent right, and, it appears to me, altogether disposes of the argument that Moore could be regarded as a licensee or assignee of Cooke. Further, Cooke had not got the conveyance. Suppose by this letter he had purported to give an equitable assignment of the right to Moore, what would become of Moore's equitable right when the conveyance is executed? Certainly, in the existing state of things, it must be admitted that this right still remains in Cooke, and may be exercised by him. He has not parted with the right, and yet the right is set up in Moore. How can both be regarded as assignees of the same right?

I greatly regret the necessity of this verdict being given against the defendant; still I must give effect to legal rights and to legal principles, which can be applied equally to cases of great importance as to this.

ANDREWS, J. [After stating the facts as given above—]:—

A number of questions were discussed during the arguments, but, from the view I take, it is not necessary for me to decide all of them.

I shall assume, as was contended for the defendant, that Mr. Cooke, by his purchase, became owner, in equity, of what he bought, viz. the rent, and the right of sporting reserved by the lease of 1792, and the grant of 1891, and that he could have lawfully exercised the right of sporting he so purchased, although he had not obtained his conveyance.

I come then to the real and important question in this case, namely, the nature and extent of the reserved right of sporting.

It is, in my opinion, well settled that such a reservation as exists in the present case, is neither a servitude annexed to any dominant tenement, nor an exception (for it forms no part of the property demised or granted) nor a reservation (for it does not lie in render), but is a *profit a prendre*, arising from what, although in terms a reservation, is in fact and operation a grant by the lessee, or grantee, to the lessor or grantor, of the demised or granted lands: *Doe* v. *Lock* (1); *Wickham* v. *Hawker* (2); *Ewart* v. *Graham* (3), per Lord Campbell, C., at pages 344, 345, of the report; and many other cases.

Under such a reservation as I am considering, it is conceded that the *profit a prendre* which it grants is not an exclusive right, but only a right of sporting to be enjoyed concurrently with the rights of the owner of the lands over which it is to be exercised. An incorporeal hereditament of this nature is wholly different from a corporeal hereditament such as the slip with its accessories, in the case of *Metcalfe* v. *Westaway* (4), which was relied upon in support of the argument that the word "assigns," in the reservation in question, included licensees.

In *Metcalfe* v. *Westaway* (4), a Railway Company, being possessed of a ship yard, in which was a slip for docking vessels, by deed demised the yard to B., "except and always reserved out of the demise the patent slip, and the machinery and apparatus connected therewith, and the site thereof, and the dues payable for the use thereof, and except and always reserved to the said Company, their successors and *assigns*, officers, servants, and workmen, free access at all times to and from the said slip, for working, using, and repairing the same or otherwise." It was held that the Company might grant licences to use the slip, on payment of certain dues, and the right of access to it was not limited to assigns of the Company in the strict sense. The Company had the absolute property in the slip and its accessories, including the right of access to it. Erle, C.J., thought the intention clear, and that effect should be given to it. Byles, J., thought the same construction would have prevailed if the word "assigns" had not been

(1) 2 A. & E. 743.
(2) 7 M. & W. 63.
(3) 7 H. L. Cas. pp. 344, 345.
(4) 17 C. B. (N. S.) 658.

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there. Keating, J., thought that the construction put by the plaintiff on the word "assigns" would preclude the Company from enjoying the free access to the slip, which was necessary to the use of it.

Andrews, J.

It seems to me obvious that a case like *Metcalfe* v. *Westaway* (1) can be no authority in a case like the present. By the combined effect of the lease of 1792, and the grant of 1891, under the Renewable Leasehold Conversion Act, the *profit a prendre* in question has become an incorporeal hereditament in fee-simple, but the nature of the right remains what it always was. It can be exercised by the person in whom it is for the time being vested, whether the original grantee of the right or his heir, or his assignee, with his attendants, gamekeepers, and servants; and further the authorities show that it can be exercised *for him and on his behalf* by his servants in his absence: *Wickham v. Hawker* (2); *Hudson* v. *Foott* (3). But no case that has been cited, or that I am aware of, goes the length of deciding that, under such a reservation as exists in this case, the owner of a *profit a prendre* has the right under it to authorize third persons, at his pleasure, to exercise the right—*not for him and on his behalf, but on their own behalf;* and, in my opinion, it would be most unreasonable to hold that this could be done under such a reservation as the present, which ought not to be construed so as to create a more extensive right than its plain terms confer. It is a grant, by the owner of the land, of a right to be exercised on his land, and concurrently with his own rights. If the grant extends to empower the grantee to authorize third persons to exercise the right on their own account, what is the limit to be? Would not this be imposing a vastly greater burden on the grantor than any reasonable construction of the words of the reservation can warrant? It would amount to an indefinite power in the grantee to authorize third persons, to an extent to which it is difficult to assign any limit, to enter on the grantor's lands, and which might be so used as to seriously infringe upon his own concurrent rights. Why should an interpretation be put on the words of this reservation which, as it appears to me, involves a large extension of them? And why should there be a

(1) 17 C. B. (N. S.) 658. (2) 7 M. & W. 63.
(3) 9 Ir. C. L. R. 203; 10 Ir. C. L. R. 509.

construction so much more than liberal of the language of the grant against the grantor? Exclusive rights of sporting can be and are granted by reservations aptly framed with express words to confer such rights, and express words can be inserted in such reservations enabling the right to be exercised by all persons to whom the grantee may give permission, whether he may accompany them or not.

In my opinion it is not reasonable to construe the limited words of the present reservation in such an indefinitely enlarged sense; and I do not think that they will bear such a construction.

Mr. Henry, in his clear reply on behalf of the defendant, manifestly felt and recognized this difficulty, and endeavoured to escape from it by contending that the letter of authority from Mr. Cooke to the defendant of the 8th of October, 1897, made the defendant an *assignee* for the time being of the right of sporting created by the reservation. This I am distinctly of opinion it did not do. Taking it even by itself, it is in my opinion a mere licence, which neither transfers the right to exercise the *profit a prendre* nor any estate therein. I think the words of Vaughan, J., in *Thomas* v. *Sorrell* (1), are applicable to it, viz. "a dispensation or licence properly passes no interest, nor alters or transfers property in anything, but only makes an action lawful" (in a case, of course, in which the licence is a valid one), "which without it would have been unlawful."

Reading the letter of the 8th of October, 1897, in connection with the defendant's letter of the 4th of October, 1897, applying for permission to shoot, it is still clearer that all that the letter of the 8th of October, 1897, gave was a mere licence, and that it transferred no estate or property; and as, in my opinion, the reservation in question did not enable the owner of the right thereby created to authorize third persons to exercise it on their own behalf, I think the defendant's justification under the letter of the 8th of October, 1897, fails, and that the verdict and judgment of the learned Judge at the trial ought not to be disturbed.

The defendant's motion therefore ought, in my opinion, to be refused with costs. The ground on which my judgment is based

(1) 1 Vaugh 350.

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renders it unnecessary for me to go into the other questions which were argued before us; but it gives my decision upon what the action appears to have been really brought to try, viz. the nature and extent of the right of sporting expressed to be reserved in the lease of 1792, and the grant of 1891.

Solicitor for the plaintiff: *Michael Maguire.*
Solicitor for the defendant: *B. H. Lane.*

A. E. R. J.

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REG. (CALLAGHAN) *v.* JUSTICES OF COUNTY DONEGAL (1).

Licensing law—Transfer—"Licensed premises," alterations in.

C. obtained an assignment of certain licensed premises and the licence attached thereto, and applied for a transfer to him of the licence. The assignment contained a reservation, in favour of the former owner and licensee, of the room at present occupied by him. The Justices refused to grant the certificate on the ground that "the whole of the licensed premises" had not been assigned to the applicant:—

Held, that the true test was not this, but whether the licensed premises, as assigned, were substantially the same as before.

CERTIORARI.

The applicant, Jeremiah Callaghan, by an agreement dated 9th December, 1897, had, with the consent of the landlord, become tenant of, and had obtained from the former tenant, Neil M'Elhinney, an assignment of a licensed house and the licence thereto attached, "excepting out of said dwelling-house the room at present occupied by the said Neil M'Elhinney." Callaghan then applied to the Justices at Petty Sessions for, and obtained an interim transfer of the licence dated the 16th February, 1898, and subsequently applied in due course for a transfer certificate at the Quarter Sessions at Letterkenny. At the hearing, before the Chairman and Justices, on the 7th April, 1898, objec-

(1) Before SIR PETER O'BRIEN, L.C.J., and O'BRIEN, ANDREWS, and JOHNSON, JJ.

tion was made to the transfer on behalf of the District Inspector of Constabulary, on the ground that part of the premises had been reserved to said Neil M'Elhinney. The Court refused to grant the certificate, and the following order was made:—"It appearing that the alleged transferor had not assigned the whole of the licensed premises to the alleged transferee, the Court is of opinion that the case does not come within the Transfer Act, 18 & 19 Vict. c. 114, and that the temporary transfer at Petty Sessions is a nullity, and accordingly makes no rule on the application, for default of jurisdiction."

Callaghan obtained a conditional order for writs of *certiorari* and *mandamus*, on the ground that the refusal of the Quarter Sessions to grant the certificate was on grounds not warranted by law; and the Chief Crown Solicitor now moved, on behalf of the Chairman and Justices, to have the conditional order set aside.

E. Morphy, for the Chairman and Justices:—

Transfers, originally governed by the 3 & 4 Wm. 4, c. 68, s. 1 (1833), are now subject to the provisions of 17 & 18 Vict. c. 89, s. 11 (which requires a certificate from Justices at Quarter Sessions), and 18 & 19 Vict. c. 114, s. 1, which enacts that on the death of a licensed person, or upon the removal of any such person from "the house or premises at which he is authorised by any such licence to carry on such business as aforesaid," or "the sale or assignment of his interest therein by operation of law or otherwise," the Justices at Petty Sessions may grant an interim licence, which requires subsequent confirmation at Quarter Sessions. For the definition of "premises," see 35 & 36 Vict. c. 94, s. 77, and 17 & 18 Vict. c. 89, s. 12. Here the assignor did not assign "his interest" in the licensed premises: the reservation to the assignor was a substantial one, which might render the premises unsuitable for the sale of intoxicating liquors. The test is whether the alteration is such that the premises are no longer the same—whether they are substantially new premises: *Deer* v. *Bell* (1); *Reg.* v. *Raffles* (2). But there it was a

(1) 64 L. J., M. C., 85. (2) 1 Q. B. D. 207.

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question of rebuilding or enlargement of the licensed premises; here, on the contrary, the premises have been diminished in size. This Court, therefore, should not interfere with the decision of the Court of Quarter Sessions.

Wylie, Q.C., for the applicant, Callaghan.

I accept the test to be, upon the authorities cited, that the premises must be substantially the same. Here the premises are in all respects the former licensed premises, save that the former tenant, a very old man (as the applicant's affidavit states) is allowed to continue on in occupation of a room. This could not interfere with, or alter, the suitability of the premises for the purposes of trade, nor did the Court of Quarter Sessions so rule. The principle upon which that Court refused the certificate was that the premises transferred must be absolutely identical in every detail with those for which the licence had been previously held. This, it is submitted, is incorrect; otherwise, the slightest most immaterial alteration would result in the forfeiture of a licence.

SIR PETER O'BRIEN, L.C.J., delivered the judgment of the Court:—

We are all of opinion that the writs of *certiorari* and *mandamus* must issue. The principle upon which the learned Chairman of the Quarter Sessions acted was incorrect. The ground of his refusal is stated in the extract from the order-book of the Clerk of the Peace to have been that "the transferor had not assigned the whole of the licensed premises to the transferee." But the true test must be whether there had been an assignment of substantially all the licensed premises to the applicant; and this, as it seems to me, is the result of the cases to which we have been referred. Mr. Morphy has endeavoured to show that in those cases the alteration was admittedly an enlargement, an improvement; but I do not think that the decisions of any of the Judges before whom those cases were decided rest upon that ground. The test upon which they acted was whether the premises were substantially the same, and this manifestly and expressly is the ground of decision

of Mr. Justice Lawrance. Here, if we were to hold that the principle upon which the Court below has acted was right, we should be led into the greatest difficulties. Absolute identity cannot be the test. Is it to be said that, if the assignee gets only 499 square feet out of premises comprising 500 square feet, he cannot obtain a certificate of transfer, and cannot legally carry on his trade? It is easy to suggest illustrations; but, having regard to the principle involved in the decisions cited at the bar, I think it is impossible to hold that the ground of decision in the Court below was right. It will be understood, however, that neither my brethren nor I can be taken as knowing what exact portion of the house it was that was reserved to the old tenant. We have no materials on which we could satisfactorily decide that question; and are forced to deal solely with the principle that, according to the entry in the book of the Clerk of the Peace, is the basis of the decision below. We think that that principle is incorrect; that the true test is whether the premises are substantially the same, not whether they are identical; and, accordingly, the order of refusal must be removed and quashed, and the writ of *mandamus* go directed to the Justices to hear and determine the matter according to law.

Solicitors for applicant: *E. J. O'Doherty & Co.*
Solicitor for the Justices: *Sir P. Coll.*

A. E. R. J.

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Jan. 18, 24.

HARTE *v.* HOLMES (1).

(1896. No. 10,046.)

Taxation—Exemption—Crown property—District Lunatic Asylum (Ireland) —Board of Control—County cess—Poor rate—Valuation Act, 1854 (17 & 18 *Vict. c.* 8), *s.* 2.

District Lunatic Asylums in Ireland under the superintendence of the Board of Control (2) are Crown property and exempt from taxation.

In order that premises should be exempt from taxation as being used for public or charitable purposes it is necessary that they should be in fact distinguished in the Valuation Lists as so used.

Case stated, pursuant to R. S. C. (Ir.), Order XXXIV., Rule 1, to the following effect (3):—

The action was brought by the collector of county cess for the barony of Nethercross, county Dublin, against the defendants, the Commissioners for the general control and correspondence and for the superintending and directing the erection, establishment, and regulation of asylums for the lunatic poor in Ireland, known as the Board of Control, to recover £50 9*s.* 11*d.*, one year's arrear of county cess, due on the 8th June, 1894, out of the lands and premises known as Portrane Demesne, in the barony of Nethercross, in the occupation of the defendants.

The plaintiff's warrant, dated 8th June, 1894, was duly issued to him, having attached thereto a copy of the revised valuation

(1) Before Sir Peter O'Brien, L.C.J., Palles, C.B., and O'Brien, J.

(2) See now 61 & 62 Vict. c. 37, s. 9.

(3) The question at issue had been first raised on a case stated by the Recorder of Dublin, which was argued before the Queen's Bench Division (Sir P. O'Brien, L.C.J., and O'Brien, J.) on the 6th and 7th of February, 1896, and was subsequently at re-argument in Michaelmas Term, 1896 (before the same Judges and Gibson, J.), when, at the suggestion of the Court, the civil bill and case stated thereon were withdrawn by the parties, in order that the present action might be instituted in the High Court.

lists for the barony. These lists had been received on the 10th April, 1894, by the secretary of the county Dublin Grand Jury from the treasurer of the county, and had been put before the Grand Jury at the Presenting Term, 1894, when the presentments for the barony of Nethercross (fiated subsequently on the 27th April, 1894) were passed. A copy of the material parts of the Valuation Lists is printed on the next page.

The plaintiff having been informed in or about August, 1894, that the Board of Control had purchased the lands of Portrane from Count James Considine (who was returned as the owner of the same in the Valuation Lists), for the purpose of erecting thereon a lunatic asylum auxiliary to the Richmond District Lunatic Asylum, by letter addressed to the Board of Control or their secretary, in the month of August, 1894, applied for payment of £50 9*s.* 11*d.*, the amount of Grand Jury cess applotted on the lands of Portrane, on the basis of the revised Valuation Lists. The plaintiff, however, received no reply from the Board of Control, but, in the month of September, 1894, received from the secretary of the Board of Governors of the Richmond Lunatic Asylum a letter acknowledging the demand for Grand Jury cess addressed to the Board of Control, and stating that the notice had been sent to the Commissioner of Valuation, with a request that Portrane might be put in the exemption column.

By indenture, dated 20th February, 1894, Count Considine, as beneficial owner, granted to the Board of Control, their successors and assigns, the said lands of Portrane therein described, to hold for the purpose of the intended lunatic asylum at Portrane aforesaid.

The members of the Board of Control (of whom, however, the Chairman of the Commissioners of Public Works in Ireland for the time being is one) are appointed from time to time by the Lord Lieutenant, pursuant to the power contained in the Act 18 & 19 Vict. c. 109, s. 5, and are removable at pleasure, and are in practice changed from time to time.

The Board of Control are charged with the duty of generally controlling asylums for pauper lunatics in Ireland, and with superintending and directing the erection, establishment and regulation of all such asylums, but the immediate management of

COUNTY OF DUBLIN—BARONY OF NETHERCROSS—PARISH OF DONABATE.

EASTER TERM, 1894.

No.	Names.		Description of Tenement.	Area.	Rateable Annual Valuation.		Total Annual Valuation of Rateable Property.	Full Rate.
	Townland & Occupiers.	Immediate Lessors.			Land.	Buildings.		
	Portrane Demesne. O. S. 12.			A. R. P.	£ s. d.	£ s. d.	£ s. d.	£ s. d.
81	Count Considine,	Reps. E. Evans,	House, Offices, & Lands,	228 3 3	206 15 0	49 0 0	255 15 0	26 12 10
82	——	——	Ruins, . . .	—	—	—	—	—
83	Elias Evans, .	Count Considine,	House and Garden, .	0 1 20	0 5 0	0 15 0	1 0 0	0 2 1
180	Count Considine,	Immediate Lessor,	Gate Lodge and Land,	240 2 9	226 10 0	1 10 0	228 0 0	23 15 0

such asylums is carried on by a local board of governors, who are appointed from time to time by the Lord Lieutenant under statutory powers, and who manage the asylums under their direction subject to rules and regulations made, on the suggestion and recommendation of the Board of Control, by the Lord Lieutenant in Council, pursuant to the Act 1 & 2 Geo. 4, c. 33, s. 5, for the good conduct and management of such asylums in general or any asylum in particular.

The members of the Board of Control, and also the Governors, are bound to act gratuitously (1 & 2 Geo. 4, c. 33, s. 5), although several of them are salaried officials of other departments.

The Portrane Asylum is intended to be an auxiliary to the Richmond District Lunatic Asylum, and will be managed by the same Governors, and the house now standing in Portrane Demesne, which is used as a temporary auxiliary asylum, is now managed by the Governors of the Richmond District Lunatic Asylum.

The funds for the support of the Richmond District Lunatic Asylum and of the Portrane Asylum, and the said temporary asylum, like those of other district lunatic asylums, are (except the profits of any lands attached to said asylums respectively) entirely derived from public sources, being partly levied by the Grand Juries of the counties comprised in the lunacy district off those counties and partly supplied by an annual contribution from the Imperial Treasury.

Since the conveyance of the 20th February, 1894, the mansion house of Portrane and temporary buildings have been used as a temporary auxiliary lunatic asylum, pending the erection of permanent buildings, and the grazing of the said lands of Portrane was in 1894 and 1895 let to different persons, and the receipts applied for the purposes of the said temporary auxiliary asylum.

The question submitted for the opinion of the Court was—Whether, under the circumstances mentioned, the defendants are liable to pay the said Grand Jury cess?

The Solicitor-General (*Dunbar Barton*, *Q.C.*), and *Jefferson*, for the plaintiff.

The claim to exemption is based either on the ground that the

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premises are used for "public purposes," and entitled therefore to be distinguished as exempt in the Valuation Lists, or on the ground that the premises in the occupation of the defendants are Crown property.

The former claim to immunity is untenable, since it is only when so distinguished in the lists that the premises are to be deemed to be exempt: see the Valuation Act, 1854 (17 & 18 Vict. c. 8, s. 2).

As to the contention that this is Crown property, the fact that the institution is in part supported by contributions from the Imperial Treasury, and is under the control of persons appointed by the Crown, is not sufficient. The premises must be occupied for the State or in the service of the State. *The Mersey Docks Trustees* v. *Cameron* (1), and *Coomber* v. *Justices of Berks* (2), establish that the prerogative of the Crown can no longer be taken to cover any cases save those where the lands sought to be charged are held directly by the Crown, or occupied directly by officers of the Crown, and used for Government purposes. The present defendants are trustees, not for the Crown, but for the purposes of the asylum—a public object no doubt, but not an Imperial or Governmental one. [Counsel referred to the following cases (of non-exemption):—*Bray* v. *Justices of Lancashire* (3); *Reg.* v. *Temple* (4); *Gambier* v. *Overseers of Lidford* (5); *Colchester* v. *Kewney* (6); *Craig* v. *University of Edinburgh* (7); *Mayor of London & Governors of St. Thomas' Hospital* v. *Stratton* (8); *Reg.* v. *Overseers of West Derby* (9); *West Bromwich School Board* v. *Overseers West Bromwich* (10); *Martin* v. *Assessment Committee of West Derby Union* (11): *Tunnicliffe* v. *Overseers of Birkdale* (12)—(of exemption) *Marquis of Hartington* v. *Bowerman* (13); *Meade* v. *Warburton* (14); *Lonsdale* v. *Wilson* (15); *Roe* v. *Darnley* (16);

(1) 11 H. L. Cas. 443.
(2) 9 App. Cas. 61.
(3) 22 Q. B. D. 484.
(4) 2 Ell. & Bl. 160.
(5) 3 Ell. & Bl. 346.
(6) L. R. 1 Ex. 369.
(7) L. R. 1 H. L. (Sc.) 348.
(8) L. R. 7 H. L. 477.
(9) L. R. 10 Q. B. 285.
(10) 13 Q. B. D. 929.
(11) 11 Q. B. D. 145.
(12) 20 Q. B. D. 450.
(13) Ir. R. 2 C. L. 683.
(14) Alc. & Nap. 287.
(15) 8 Ir. L. R. 412.
(16) 1 H. & B. 442.

Reg. v. *Commissioners of Salter's Load Sluice* (1); *Reg.* v. *Liverpool* (2); *Reg.* v. *St. Martin's* (3); *Reg.* v. *M'Cann* (4)].

The result of the authorities is that an institution such as this, though no doubt used for public purposes, and, under the Valuation Acts, to be deemed to be exempt when the condition of exemption imposed by those Acts is fulfilled, is not Crown property, nor used in and for the service of the Crown; and this view is strengthened by the fact that until now this prerogative claim to immunity has never been raised.

The Attorney-General (*The Rt. Hon. J. Atkinson, Q.C.*), and *Vesey Fitzgerald*, for the defendants:—

The premises not being in fact distinguished as exempt in the Valuation Lists for the year 1894, we do not contend that they are entitled to exemption under the Valuation Acts; but we submit that the defendants, who are appointed and removable by the Crown, and have no beneficial interest in the property, are trustees for the Crown, and are not liable to taxation: *Meade* v. *Warburton* (5); *Hartington* v. *Bowerman* (6). They carry out not local but Imperial objects, under the direct control of the central authority, under a code of regulations promulgated by the Lord Lieutenant in Council, by which provision, in every most minute detail, is made for the management of these establishments. Unlike county asylums in England—which are regarded as local institutions, not as Crown property, and, so far as concerns the portions in the occupation of officials, are not exempt from tax: *Bray* v. *Justices of Lancashire* (7)—district asylums in Ireland, a direct offshoot of the prison system of the country have always been under the immediate control of the executive, and are to be treated, no less than are prisons, as Crown property, and occupied in the service of the State.

Cur. adv. vult.

(1) 4 T. R. 730.
(2) 7 B. & C. 61.
(3) L. R. 2 Q. B. 493.
(4) L. R. 3 Q. B. 141, 677.
(5) Alc. & Nap. 287.
(6) Ir. R. 2 C. L. 683.
(7) 22 Q. B. D. 484.

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Jan. 24.

SIR P. O'BRIEN, L.C.J.:—

The question in this case, which is of general importance, is whether the members of the Board of Control are liable for the payment of Grand Jury cess in respect of certain lands and premises known as Portrane demesne, in the barony of Nethercross and county of Dublin, which lands and premises are stated in the case to be in the occupation of the defendants.

It appears that the Board of Control had purchased the lands of Portrane from Count James Considine (who was returned as the owner of the same in the Valuation Lists) for the purpose of erecting thereon a lunatic asylum, auxiliary to the Richmond District Lunatic Asylum; and, by indenture, dated the 20th February, 1894, Count Considine, as beneficial owner, had granted to the Board of Control, their successors and assigns, the said lands of Portrane therein described, to hold for the purpose of the said intended lunatic asylum at Portrane aforesaid. The special case, which has been stated in this action for the opinion of the Court, then proceeds in these words:—"The Portrane Asylum is intended to be an auxiliary to the Richmond District Lunatic Asylum, and will be managed by the same governors, and the house now standing in Portrane demesne, which is used as a temporary auxiliary asylum, is now managed by the Governors of the Richmond District Lunatic Asylum. The funds for the support of the Richmond District Lunatic Asylum, and of the Portrane Asylum, and the said temporary asylum, are (except the profits of any lands attached to said asylums respectively) entirely derived from public sources, being partly levied by the Grand Juries of the counties comprised in the lunacy district, off those counties, and partly supplied by an annual contribution from the Imperial Treasury. Since the said conveyance of the 20th February, 1894, the said mansion house of Portrane and temporary buildings have been used as a temporary auxiliary lunatic asylum, pending the erection of permanent buildings, and the grazing of said lands of Portrane was in 1894 and 1895 let to different persons, and the receipts applied for the purposes of the said temporary auxiliary asylum."

The purpose then for which the conveyance was made to the Board of Control is clear; so is the user of the lands and premises

conveyed. Are then the members of the Board of Control liable for the payment of Grand Jury cess? Two grounds of exemption are relied upon—first, that the Board of Control, and all the asylum officials, are servants of the Crown, and occupy the premises for government purposes, and are therefore not liable; secondly, that, admitting that the status of the Board of Control was only that of trustee for public purposes, yet the lists or tables of valuation were not conclusive, and that, where, in fact, hereditaments and premises were altogether of a public nature, it was not necessary that they should be so distinguished on those lists or tables in order to entitle them to exemption from taxation.

This second ground of objection was abandoned at the bar by the Attorney-General; and, we think, rightly abandoned, because it seems to us to be plain that, on the true construction of the statute, where exemption is claimed on the ground that hereditaments and premises are of a public nature, to be distinguished as such on the lists is a necessary condition of exemption. The lands and premises in question were not, at the time the Grand Jury cess now sued for was struck, so distinguished on the lists, and therefore the second ground of the alleged immunity fails.

I now proceed to consider the first ground of alleged exemption, which was the more favoured by Mr. Fitzgerald in his lucid opening statement. I experienced some difficulty during the argument on this point; and the difficulty was this—does the case come within any of the propositions laid down by Lord Blackburn in *Cameron* v. *The Mersey Docks Trustees*? (1). Lord Blackburn, in his judgment in that case, says that the Crown, not being named in the Statute of Elizabeth, is not bound by it, and that consequently the overseers could not impose a rate on the sovereign in respect of lands occupied by Her Majesty, nor on those occupied by the servants of Her Majesty. This is the general proposition with which we are all familiar. Then, after referring to various departments of the State, which are exempt from taxation on the above principle, such as the Post Office, Horse Guards, and Admiralty, and also to various other establishments and premises, such as barracks for the local police, county buildings

(1) 11 H. L. Cas. 443.

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occupied for the assizes, Judges' lodgings, County Courts, and jails, which are also exempt—Lord Blackburn is reported to have said :—"In these latter cases it is difficult to maintain that the occupants are, strictly speaking, servants of the sovereign, so as to make the occupation that of Her Majesty; but the purposes are all public purposes of that kind which, by the constitution of this country, fall within the province of government, and are committed to the sovereign, so that the occupiers, though not strictly servants of the Crown, might be considered in *consimili casu*."

Now this passage in Lord Blackburn's judgment was, he tells us in *Reg.* v. *M'Cann* (1)—the Chelsea Bridge Case—settled with great care by the majority of the Judges, who agreed with him. It cannot be said that the general care of the lunatic poor was a public purpose which, by the constitution of this country, fell within the province of government, and was committed to the sovereign. No doubt the sovereign, as *parens patriæ*, had the protection of all his subjects, and, in a peculiar manner, the care of the imbecile. This was said by some to belong to the prerogative, and by others to be a *regium munus*, as was pointed out by Baron Pollock in his valuable judgment in *Bray* v. *Justices of Lancashire* (2); but this care was exercised in a limited way as pointed out by the same learned Judge (see page 491 of the report), and he adds :—"There is no trace in our law books or elsewhere of the Crown having taken upon itself the general custody and maintenance of persons of unsound mind." This is, undoubtedly, quite true, and therefore I experienced some difficulty as to whether this case came strictly within any of the cases of exemption that were regarded by Lord Blackburn in his judgment in *Cameron* v. *The Mersey Docks Trustees* (3) as certain and well established. To refer again, however, to the judgment of Pollock, B., I find that, in dealing with the case of *Coomber* v. *Justices of Berkshire* (4), he said :—"They," that is to say the Judges who decided the latter case, "also agreed that, in order to establish an exemption, the premises in question must be such that they can be properly treated as being occupied by the Crown, or for Crown purposes, or for public

(1) L. R. 3 Q. B. 141, 677.
(2) 22 Q. B. D. 484.
(3) 11 H. L. Cas. 443.
(4) 9 App. Cas. 61.

purposes of such a kind as to fall within the province of government."

Now, in my opinion, the care of the insane in this country in such an establishment as the Portrane asylum appears to be, and has been made by a series of legislative enactments, a public purpose of such a kind as to fall within the province of government. And though, by the constitution of this country, to recur to the language of Mr. Baron Pollock, the Crown did not take upon itself the general custody and maintenance of persons of unsound mind; yet, in this country, as distinguished from England, the care of the insane has become a purpose of the Crown.

The case of *Bray* v. *The Justices of Lancashire* (1), so much pressed by the learned Solicitor-General in his able argument, while it clearly shows that, in England, lunatic asylums should not be exempt from taxation, shows at the same time that in Ireland District Lunatic Asylums should be exempt. In that case, Mr. Baron Pollock, speaking of the Lancashire Asylum, said:—"It is a county asylum built and conducted under the Lunatic Asylums Act; the effect of the statute is that the justices of every county are required and empowered to maintain a lunatic asylum with a proper staff of officers for the maintenance and care of pauper lunatics within their county. This is, no doubt, a matter of public interest, and, it may be, essential to the public welfare; but, as a matter of duty and necessity, the justices in carrying out the requirements of the Act cannot be said to be discharging the functions which belong to the Crown or government of the country at large any more than when they are doing many other things either in obedience to a statute, or otherwise, which are requisite for the well-being of the country." It is plain from this that what is in this country done with the most minute particularity by the Lord Lieutenant in Council, rests altogether with the local justices in England. Here the Viceroy is the direct source of all authority for the establishment of these district asylums, and their management. Commencing with the 1 & 2 Geo. 4, and travelling down through a series of statutes, we find that the primary authority and responsibility rests with the Lord

(1) 22 Q. B. D. 484.

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Lieutenant. There is a gradual expansion of the purpose or object—the original limited purpose, viz. the care of criminal lunatics becoming expanded into the far wider purpose of the care of the lunatic poor; and now these District Lunatic Asylums are managed by a code of regulations emanating from the Lord Lieutenant—most minute in their particularity, and most commendable in their exhibition of paternal care. The powers of appointment and of dismissal of the various officers rest with the Lord Lieutenant, or are subject to his approval. The members of the Board of Control are appointed by the Lord Lieutenant, and are removable by him at pleasure; and the local governors are appointed by, and subject to removal, by the Crown.

These asylums, in my opinion, are in the nature of government institutions, administered and occupied by the servants of the Crown, and are therefore exempt from taxation.

PALLES, C.B. :—

The amount which is involved in this case is small, but the question argued is one of great general importance, as it calls for a determination of the rateability to Grand Jury cess of District Lunatic Asylums in Ireland.

The practice of the Valuation Office, since the Valuation Act of 1852, is stated by the learned Solicitor-General to have been to distinguish these asylums, in the tables or lists of valuation, as hereditaments of a public nature; and therefore exempt, under 17 Vict. c. 8, s. 2, from *inter alia*, Grand Jury cess, so long as they continued to be of a public nature and occupied for the public service. I do not understand that the practice has been to state, in the appropriate column, that the Crown is the occupier.

The hereditaments in question in this action were conveyed to the defendants, as Commissioners for the control of Lunatic Asylums, under 1 & 2 Geo. 4, c. 53, by a deed of 20th February, 1894. The rate sued for was made on the 27th April, 1894; and at that time, and at the time when its respective moieties became payable, the hereditaments were used as and for the purposes of a temporary auxiliary lunatic asylum. It is stated in the case, but I think it must be stated as a conclusion of law, that the defendants

are in occupation of those premises. I should prefer to say that the premises are occupied by persons claiming under that deed.

The hereditaments were not, and, owing to the length of time necessarily involved in complying with the cumbrous machinery of our Valuation Acts, probably could not have been, distinguished as being of a public nature in the tables or lists of valuation upon which the rate sued for was made; and, towards the end of the argument, it was admitted by the Attorney-General that, for that reason, exemption could not be claimed under section 2 of the Act of 1854.

The defendants, however, insist that they are entitled to exemption upon another ground, viz. that the hereditaments are in the occupation of the Crown; and I am of opinion that, if this be the true nature of the occupation, the defendants are entitled to rely upon it, although the hereditaments are not exempted in the valuation lists. The Crown, not being named in the Grand Jury Act, is not bound by it; and, were there nothing more, a rate could not be imposed upon the Sovereign, in respect of lands occupied by Her Majesty, or by her servants. In that event there would be an absence of jurisdiction to rate, and the facts showing a want of jurisdiction are capable of being relied upon as a defence to an action for the rate. It possibly might be argued, upon the construction of the Valuation Act, that premises of this description ought to be stated in the lists, and to be therein distinguished as exempt; but, even if this be so, it is impossible to construe this Act, which shows upon its face an intention that premises in the possession of the Crown shall be excluded from taxation, as conferring powers to tax the Crown under any circumstances whatsoever.

The contention, however, that these premises are in the occupation of the Crown, and therefore exempt, if well founded, involves some interesting and important considerations. In that event, the principle upon which the Valuation Office has acted since 1852 should be so altered that, if the hereditaments are at all to continue to be specified in the lists—a question as to which I say nothing—the occupier should be stated to be the Crown. This alteration will carry with it substantial advantages to the Irish counties in which District Lunatic Asylums are situated—advantages which, to the present, they have not received.

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Exemption from rating under 17 Vict. c. 8, sect. 2, does not necessarily carry with it any right of reimbursement by, or contribution from, the Crown, because it has been decided in this Court, in the *Belfast Harbour Commissioners* v. *Commissioner of Valuation* (1), that "public purposes," in that Act, are not confined to purposes of the Crown. Where, however, the exemption is upon the ground that the occupation is that of the Crown, then the exempt hereditaments are "Government property," within the expression for which the Legislature annually provides, by the Appropriation Act, a large sum of money as "contributions in lieu of rates in respect of Government property." For reference to this item in the Appropriation Act of the present year, see 60 & 61 Vict. c. 69, sch. b, part 8, clause 1, No. 13.

Thus the curious result will ensue, that if the plaintiff, who represents the county, succeeds in his present contention, that county will not, for the future, receive, in respect of these hereditaments, either rates or Government contribution for rates. It will not receive rates, because the hereditaments will in future be exempt under 17 Vict. c. 8, by reason of their occupation being for public purposes. Nor can it receive Government contribution in lieu of rates, because, *ex hypothesi*, the hereditaments will have been decided not to be Government property. Thus his victory, if he succeeds, will be rather of a Pyrrhic character. So, too, as regards the Crown, who by the Attorney-General defend this action for the nominal defendants. If the defendants succeed, the Treasury will have, if the present course of legislation shall continue, the duty and, I have no doubt, the satisfaction of making an annual contribution to the county in lieu of rates for this asylum—a contribution which by reason of the exemption not having been placed upon its true basis, has not, as yet, been paid in respect of Irish lunatic asylums.

The consequences, however, are not for us. Our duty is to decide the dry legal question; but I may be excused for stating that I am glad that the accidental circumstance of the time, between the purchase and the rate, being insufficient to have the necessary entries made in the lists, has resulted in the oppor-

(1) [1897] 2 I. R. 516.

tunity of this Court putting upon its true basis the respective rights and obligations of the Crown and the county, in respect of the county taxation of District Lunatic Asylums.

I am of opinion that the contention of the Attorney-General and of Mr. Fitzgerald, that these hereditaments were, at the time the rate was made, in the occupation of the Crown, is corrrect; that they are therefore not rateable, and that our judgment must be for the defendants.

Before referring to the statutes, upon the construction of which I have arrived at this conclusion, it is right that I should shortly advert to the principle of law which exempts from rates premises so occupied. I do so because I am unable to agree with the view of it presented by the learned Solicitor-General. The English cases upon the subject of exemption from rating, by reason of the alleged public nature of the occupation of the property sought to be rated, from the time of Lord Mansfield, down to the decision of the *Mersey Docks Case* (1) in 1864, are admittedly a mass of chaotic confusion. The germ of the departure from the true legal principle will be found, probably for the first time, in the judgment of Lord Mansfield in *The King* v. *St. Luke's* (2); but the earliest of the actual decisions since held to have been erroneous is *The King* v. *Commissioners of Salter's Load Sluice* (3), a decision of Lord Kenyon's in 1792. The influence of that decision is apparent in, at least, one distinct line of decision between that time and the judgment of the House of Lords in 1864.

We start, therefore, with that decision of the House of Lords in *Cameron* v. *Mersey Docks Trustees* (1). The opinion of Lord [then Mr. Justice] Blackburn in that case, has ever since been considered as an authoritative statement of the law. It was followed, almost in words, in the opinion of Lord Cranworth in the same case; and it is stated in *The Queen* v. *M'Cann* (4) that it was carefully considered and altered by the Judges who advised the House of Lords, so that it must be taken as expressing, not merely Lord Blackburn's individual opinion, but also that of all those Judges. "The Crown," he says, "not being named in the

(1) 11 H. L. Cas. 443.
(2) 2 Burr. 1053.
(3) 4 T. R. 730.
(4) L. R. 3 Q. B. 141.

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statute of Elizabeth, is not bound by it; and consequently the overseers cannot impose a rate on the Sovereign in respect of lands occupied by Her Majesty, nor on those occupied by her servants for Her Majesty. The exemption depends entirely on the occupier, and not on the title to the property. The tenants of Crown property, paying rent for it, are rateable like all other occupiers; and it has even been determined that where apartments in Hampton Court, a royal palace, were gratuitously assigned to a subject, who occupied them by the permission of the Sovereign, but for the subject's benefit, the subject was rateable in respect of her occupation of this royal property: *The Queen* v. *Lady E. Ponsonby* (1). On the other hand, where a lease of private property is taken in the name of a subject, but the occupation is by the Sovereign or her servants on her behalf, the occupation being that of Her Majesty, no rate can be imposed: *Lord Amherst* v. *Lord Somers* (2). So far, the ground of exemption is perfectly intelligible; but it has been carried a good deal further, and applied to many cases in which it can scarcely be said that the Sovereign or the servants of the Sovereign are in occupation. Long series of cases have established that where property is occupied for the purposes of the government of the country, including under that head the police, and the administration of justice, no one is rateable in respect of such occupation. And this applies not only to property occupied for such purposes by the servants of the great departments of State, such as the Post Office (*Smith* v. *Birmingham* (3)), the Horse Guards (*Lord Amherst* v. *Lord Somers* (2)), or the Admiralty (*Queen* v. *Stewart* (4)), in all which cases the occupiers might strictly be called the servants of the Crown; but also to property occupied by local police (*Justices of Lancashire* v. *Shelford* (5)), to county buildings occupied for the Assizes and for the Judges' lodgings (*Hodgsen* v. *Local Board of Carlisle* (6)), or occupied as a county court (*Queen* v. *Manchester* (7)), or for a jail (*Queen* v. *Shephard* (8))."

Now follows the passage upon which the Solicitor-General has

(1) 3 Q. B. 14.
(2) 2 T. R. 372.
(3) 7 E. & B. 483.
(4) 8 E. & B. 360.
(5) E. B. & E. 225.
(6) 8 E. & B. 116.
(7) 3 E. & B. 336.
(8) 1 Q. B. 170.

relied :—"In these latter cases it is difficult to maintain that the occupants are, strictly speaking, servants of the Sovereign, so as to make the occupation that of Her Majesty; but the purposes are all public purposes, of that kind which, by the constitution of this country, fall within the province of Government, and are committed to the Sovereign, so that the occupiers, though not perhaps strictly servants of the Sovereign, might be considered *in consimili casu*. And the decisions are uniform, and were not disputed at the bar, that the exemption applies so far."

The meaning of these words of Lord Blackburn is clear. The two classes into which the series of decisions referred to are divided are, first, cases in respect of property of which the servants of the Crown are in actual occupation, such as the Post Office, the Horse Guards, or the Admiralty; secondly, cases as to county courts, county jails, and other property in the occupation of county authorites, such as local police. Property of this description is exempt, because of the purposes for which it is occupied being public purposes, "of that kind which, by the constitution of this country, fall within the province of Government, and are committed to the Sovereign." In this class of cases the law appears to hold that the purpose of the occupation affects the occupier, and that as that purpose is a Crown purpose, the occupier who occupies for that purpose is notionally, although he is not actually, a servant of the Crown; and, by reason of what I may call that fiction of law, the premises are exempt from liability as such. But in reference to cases of the first class, that is where the persons in actual occupation are servants of the Crown, the purpose is immaterial. The mere fact that the premises are in the occupation of servants of the Crown, *quâ* such servants, logically as well as legally involves that the premises so used by them, *quâ* servants of the Crown, are used for purposes of the Crown. This distinction is illustrated by *The Queen* v. *West Derby Overseers* (1). There the question was the rateability of premises occupied as a certified industrial school. It had been held, prior to the *Mersey Docks Case* (2), in *Sheppard*

(1) L. R. 10 Q B 285 (2) 11 H. L. Cas. 443.

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v. *Overseers of Bradford* (1), that a reformatory school was not rateable; and Lord Blackburn, when pressed with that case, says:—"I think if that case had been rested on the ground that the occupier of the reformatory school had been a servant of the Government, it would have been a question, though I should have differed from the conclusion of fact, whether we could overrule that case; but I think, when we look at the reasons given, the decision rests on the ground that the occupation was for a public purpose." That is, he holds that the purpose, *quâ* purpose, was insufficient to work an exemption, if the occupation were in a person not a servant of the Crown, but that the decision would have been otherwise had the occupier been a servant of the Crown. So, recently, it has been held, in *County Council of Middlesex* v. *Assessment Committee of St. George's Union* (2), that although no part of "the Westminster Guildhall" was in the actual possession of the Crown, but the entire of it in that of the London County Council, so much of it as was used for the purpose of the administration of justice was by reason thereof in the notional possession of the Crown, and therefore exempt from rating. Lord Ludlow says:—"So much of the building as is occupied for Crown purposes, such as the administration of justice and police business, is not liable, because it stands *on the same footing as* premises occupied by servants of the Crown."

Taking this as the settled principle applicable to the case, I am of opinion that the circumstances of the present case bring it within the first class, and that therefore the argument of the Solicitor-General, that "the purpose here is one which does not fall within the province of Government, but is a purely local or county purpose," does not apply.

The defendants were appointed under 1 & 2 Geo. 4, c. 33. By sect. 2 of that Act the Lord Lieutenant is authorised to direct, with the advice and consent of the Privy Council, that any number of asylums for the lunatic poor shall be erected in districts in Ireland. By sect. 3, the Grand Jury are required to direct to be raised off the county any monies for defraying the expenses of erecting the same, and for maintaining the same, to such

(1) 16 C. B. (N. S.) 369. (2) [1897] 1 Q. B. 64.

amount, and in such proportions, as shall be directed by any Order of the Lord Lieutenant. By sect. 4, the Lord Lieutenant, with the advice of the Privy Council, is empowered to direct any sum to be advanced out of the Consolidated Fund, and to be paid and applied for the erecting of any such asylum, in such sums, and at such times, in such manner and proportions, and under such conditions, as to the Lord Lieutenant and Privy Council shall seem best suited for promoting the beneficial purposes of the Act; and that section proceeds to direct that, after the asylum shall be fit for the reception of the lunatic poor, the Grand Jury shall present such sums for the repayment of the moneys so advanced, at such times and in such proportions as shall be directed by the Lord Lieutenant. Section 5 is the section under which the present defendants have been appointed. It empowers the Lord Lieutenant, with the consent of the Privy Council, to appoint such persons as he shall think fit to be Governors or Directors of any such asylum, and also to appoint persons, not exceeding eight, to be "Commissioners for the general control and correspondence, and for superintending and directing the erection, establishment and regulation" of all such asylums; and it empowers the Lord Lieutenant and Privy Council to make, or upon the suggestion of the Commissioners to adopt, rules for the good conduct and management of such asylums in general, or any of them in particular. By sect. 6 the Commissioners are empowered to rent or purchase lands, which it directs to be conveyed to them in trust "to and for the uses and purposes of the said District Lunatic Asylum." Section 7 directs Grand Juries of counties for which any such asylum shall be established, or ordered so to be, from time to time to present, to be raised off the county, all monies necessary for building and purchase, or for paying rent, or any such disbursements or expenditures as are therein mentioned, or any part or proportion thereof, to be ascertained by an order of the Lord Lieutenant. Other sections confer certain express powers upon the Commissioners. For instance, by sect. 9 they are empowered to issue precepts to sheriffs preliminary to holding courts for the valuation of lands required for the purposes of the Act. Under sect. 10 they have the power of holding such court, and of proceeding to

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such valuation of lands. Section 11 confers on them such of the powers given by the Act of 50 Geo. 3, as relate to the taking of land, and power to appoint persons to preside at inquisitions for ascertaining the price to be paid for the purchase. But I am unable to find in the Act anything other than the word "regulation" in their title that authorizes these Commissioners, the present defendants, to at all interfere in the internal management of these asylums. The Act is vague as to the respective powers vested in the Governors and in the Commissioners; but having read through the entire of the complicated codes of which this Act is the foundation, I have been unable to find that any power is vested in these Commissioners of Control which would authorize them to occupy these lands, as distinct from their power to enter the lands, as builders, for the purpose of erecting buildings thereon. But, however, that may be, it is clear, from the sections of the Act I have referred to, that the only sums of money which the Commissioners can receive are such as the Lord Lieutenant shall direct. They have but two sources of income: first, the Consolidated Fund; secondly, Grand Jury presentments; and to obtain anything from either of those sources, the Order of the Lord Lieutenant is, by the statute, a condition precedent, and the making of such an order is entirely in the discretion of His Excellency. It must be admitted that it was the intention of the Legislature that for any sum of money to which these Commissioners might legally become personally liable for acts lawfully done under the provisions of the Act, they should have a *right* of indemnity, a real *right* in law, as distinct from a chance dependent upon an exercise, incapable of being enforced in law, of an absolute *discretion*. But, if they are liable here, they cannot have any such right. To hold that they had, would be equivalent to determining that there was authority, by something in the nature of a mandamus, to compel the Lord Lieutenant to do that which, by the Act of Parliament, is left to his sole discretion—a determination absolutely impossible. The only other alternative is that the Act intended that the occupation of these asylums, if it is to be at all deemed to be that of the Commissioners, should be that of them, *quâ* servants of His Excellency, upon whose volition it depends whether they shall or shall not

have funds to satisfy the obligation which would rest upon them personally, if the occupation were in them otherwise than as his servants.

The only other portion of the Code to which I think it necessary to refer is the 30th and 31st Vict. c. 118. The spirit of this Act is that the staff of officers and servants of each asylum must be fixed by the Lord Lieutenant; that His Excellency must be a party to the appointment of the principal officer, the Resident Medical Superintendent; that this officer is to hold office only during His Excellency's pleasure; that no other officer can be appointed otherwise than provisionally without His Excellency's approval; that the asylum must be conducted and managed in accordance with rules and regulations prescribed by His Excellency; that the control and guidance of the officers must be in accordance with rules prescribed by him; and that the only persons who are authorized to interfere in the management are the Governors, all of whom hold office at his pleasure.

Several series of rules have been made by successive Lords Lieutenant under the powers conferred by that Act; and they strongly corroborate the view I have adopted as to the occupation of the asylum not being in the present defendants. By those now in force, the Board of Governors are directed to examine into all fiscal details and the general management of the asylum. They are to make inspections, and to enter the results thereof on their minutes. They are to transmit to the Inspectors of Lunatics, who are Government officers, estimates of expenditure. Contracts are to be entered into by the Governors in the name of the Resident Medical Superintendent. No resolution of the Board of Governors affecting the discipline or management of the asylum, if contrary to any of the rules of the Lord Lieutenant, is to take effect, unless approved of by His Excellency. The dietary is to be regulated by the Board, subject to the approval of the Inspectors, who are Government officers. Extras, outside the general dietary, are to be prescribed on the responsibility of the Resident Medical Superintendent, also a Government officer. He, too, with the sanction of the Inspectors, Government officers, is to fix the hours of meals. The Resident Medical Superintendent is to superintend and regulate the whole establishment.

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The same rules prescribe the duties of the officers and servants with the utmost minuteness.

Upon a full consideration of the statutes to which I have referred, and many others which I do not think it necessary to mention in detail, I have come to the conclusion that in no sense is the occupation of this District Lunatic Asylum in the defendants. I am satisfied that it is a Government establishment, controlled by His Excellency the Lord Lieutenant, as representing the Sovereign, through servants of the Sovereign, and that it must be deemed to be in the actual occupation of the Crown.

I desire to add that, even had I arrived at the conclusion that the actual occupation was in the defendants, I should still be of opinion that the purpose of that occupation was such as, within the words of Lord Blackburn, would make the occupation that of Her Majesty. This depends upon whether the purpose of this District Lunatic Asylum, constituted as it is under the statutes I have referred to, is, or is not, a public purpose, "of that kind which, by the constitution of this country, falls within the province of Government, and is committed to the Sovereign." By the words "constitution of this country," Lord Blackburn meant the constitution as actually existing, under the combined effect of the common and the statute law. I care not whether the treatment of the lunatics in these asylums is vested in the Sovereign by the common, or by the statute, law. It is sufficient for me that it is so vested. In England lunatic asylums are controlled by local authorities; and therefore it cannot be said that there the purpose of a lunatic asylum is one of that kind which, "by the constitution, falls within the province of Government, and is committed to the Sovereign." There, it is committed not to the Sovereign, but to county authorities. But, in reference to this country, the case is different. It is impossible to study the statute law without seeing that the Legislature has considered that Ireland has not, as yet, emerged from a state of tutelage, and that many purposes which, in England, may safely be, and in fact are, committed to local authority, must in Ireland be carried out under the direct and immediate control of the Crown. In this respect the consti-

tution of this country, in the sense in which that expression is used by Lord Blackburn, is different from that of England; so that that which, in England, is the province of the county, may in this country be, and in reference to the matter in hand, the control of lunatic asylums, in my opinion is, "the province of the Government," and "committed to the Sovereign," within the meaning of the judgment of Lord Blackburn.

I agree that our judgment must be for the defendants.

O'BRIEN, J.:—

The question in this case—as to the absolute right to exemption of public lunatic asylums in Ireland from rates—appears to have arisen now for the first time, and, as it would seem, could only arise from the circumstances of an institution of the kind having ceased to be, or from its accidentally not having been, distinguished in the Valuation Lists as buildings used for public purposes. This ground of exemption (user for public purposes), from which many of the arguments, both for and against, have nevertheless been drawn, is, however, subject to separate considerations, and has certain qualifications and conditions of exemption attached thereto; while the present case must rest upon the claim to absolute exemption on the ground of the buildings being Crown property, in the sense in which it is contended that term must be understood according to the rules of law. As the result of various decisions, excluding one element or another from that description, perhaps the point may be most accurately represented by the question whether they are "Government establishments."

The exemption of Crown property is frequently stated to be founded on the rule that the Crown cannot be bound by statutes in which it is not named; and it is upon this ground that the judgments in the *Mersey Docks Trustees* v. *Cameron* (1) proceed; but it seems more naturally to follow from the nature of the sovereign power in the State; for it would appear to be inconsistent if that power were to be made subject to the burdens which in theory it imposes upon others, unless by its own consent; and,

(1) 11 H. L. Cas. 443.

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it may be said, an Act of Parliament, in which it is named, is the only evidence of that consent. The more immediate practical objection is that there are no funds to pay taxes except those which are voted by Parliament and appropriated to other objects, unless indeed the rates were included in the cost of maintenance, and in that way thrown upon the counties which form the district, which themselves are the recipients of the tax.

District Lunatic Asylums in Ireland are institutions to which there is no complete analogy; and this creates the difficulty of applying to them decisions concerning other establishments of a public nature. They are vested by law not in Her Majesty, her heirs and successors, but in trustees for lunatic asylums. They are built by means of funds advanced by the Treasury, but liable to be repaid by the counties, and maintained by presentments compulsorily made, without any discretion on the part of the Grand Juries who represent those counties, with the aid of a certain contribution from public funds. The question has been put, what would become of them in case the trust ceased; and it occurs to me that in that event they would not be vested either in the Crown or in the counties, but would be left to be dealt with by an Act of Parliament, upon a contingency which in the order of nature is impossible. On the other hand they came into existence by the direct command of the State. The trustees, that is, the members of the Board of Control, are appointed by the Lord Lieutenant, and are removable by him. All the officers, in like manner, are appointed by him, or subject to his approval, and their salaries fixed and alterable by his order. The regulations for their management, and all changes in them, are made by the Lord Lieutenant in Council. These are essential functions of the State, and identify absolutely the establishments to which they apply. In the *Mersey Docks Trustees* v. *Cameron* (1) Lord Westbury included lunatic asylums in the class of premises which are exempt merely on the ground of their being devoted to public purposes, as distinct from those in the possession of the Crown. But lunatic asylums in England are wholly different from those in Ireland, in their statutory origin, their management, their

(1) 11 H. L. Cas. 443.

control, and their use. They are mere county institutions. What distinguishes such asylums in Ireland, above all other circumstances, from those establishments as to which questions have arisen in England, is that they are properly institutions of police. The Attorney-General urged that it could not be contended that, before 1845, when the Dundrum Asylum for criminal lunatics was erected, the asylums then existing were not used for Government purposes, inasmuch as criminal lunatics of all classes were committed to them. There is not any case in which the question has arisen whether an alteration in the use would affect the exemption of Crown property, as it would that of buildings for public purposes merely. But, though it was deemed more convenient to have a general asylum for the criminal or dangerous insane, it is undoubted that the power of the Lord Lieutenant to order the detention of such persons in any asylum still continues; so that the physical restraint of the person, whether temporary or permanent, the exclusive right to exercise force, constituting the visible index and essential distinction of the authority of the State, and the retention of the control and management in the hands of the Crown, even after the necessity has ceased, demonstrate the continued assertion of that authority. They were jails at one time, and may be still used as jails; and, if they were once in the possession of the Crown as part of the machinery for penal or preventive justice, the continued possession of them could not, as it appears to me, be affected, as to the ground of the exemption, by the change of circumstances. The title to the freehold makes no difference—that was laid down by Lord Blackburn in the *Mersey Docks Case* (1)—nor the fact that the possession was not directly that of the Crown, but of trustees even though not strictly servants of the Crown. In fact, every element in previous decisions is detached from this case but that of being for Government purposes; and the single point in the case, not covered by decision, is whether the same effect follows from their being under Government control and management. Telegraphs and the Post Office, though originally private concerns, used no doubt for the benefit of the public, have become a Government department, and of course are not subject to taxation.

(1) 11 H. L. Cas. 443.

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With respect to the authorities, the present case is not identical with *The Queen* v. *M'Cann* (1), which, however, approaches most nearly to it. The Board of Control is not a body of the same nature as the Commissioners of Public Buildings. The latter are a department of the State, their duty was not confined to the particular undertaking in that case, and the property (the Chelsea Bridge) was directly that of the Crown. The money to build the bridge was advanced by the Treasury, and the tolls were to be applied in payment of it, and of the works and expenses of maintenance, and, if there was any surplus, towards the diminution of the tolls in future. On the other hand, the Board of Control is a body called into existence by statute, as a part of the official machinery of the State, and, if not subject to political change, liable to be altered at any time by the direct action of the Crown. They have no profit from the undertaking, though this might not be sufficient alone to exempt them according to the other branch of the *Mersey Docks Case* (2); but they have, further, no funds for the purpose of paying rates, and they are the parties who would be sued, and not the Grand Juries as representing the counties; and any goods and chattels which they have, which certainly are not vested in the Grand Juries, and must be vested in them as occupying for the Crown, would be liable to be seized, and the charge of the county cess on the lands would be a charge on property certainly not in the possession of the county. There was no further trust declared of the bridge any more than there was of the asylum, for the like reason—that there would always be people to cross, and people to go mad, and laws are not made for things that never happen.

But the great distinction of this from all other cases is the object of the use—the custody of the person, whether of the innocent insane, or criminal—the abridgment of liberty which marks off the province of the State and assimilates the present case to police barracks, court-houses, and other such premises.

As to the case of *The Queen* v. *Temple* (3), in which the Council of Education were held liable to rate for a normal school—established out of funds provided by Parliament—it certainly is

(1) L. R. 3 Q. B. 141, 677. (2) 11 H. L. Cas. 443. (3) 2 Ell. & Bl. 160.

not law. That decision is not mentioned in any of the judgments of the Judges, or of the House of Lords, in the *Mersey Docks Case* (1), though it went in the direction of the decision; and it comes under the observation which Lord Blackburn refers to as having been made at the bar, that, after Lord Campbell took his seat on the Bench, decision took a different turn as to liability to rate. Lord Campbell himself, in referring to *The Queen* v. *Temple* (2), in *De la Beche* v. *Vestry of St. James'* (3)—the case of the museum of practical geology—and in refusing to apply it to the latter case, put it upon the ground that a great part of the premises was in the beneficial occupation of persons, and the pasturage was let at a rent—a ground not consistent with later decisions in the instance of Crown property. The general rule is laid down by Lord Blackburn in these words:—"Long series of cases have established that where property is occupied for the purpose of the government of the country, including under that head the police and the administration of justice, no one is rateable in respect of such occupation. And this applies not only to property occupied for such purposes by the servants of the great departments of the State, such as the Post Office, the Horse Guards, or the Admiralty, in all which cases the occupiers might strictly be called the servants of the Crown, but also to property occupied by local police, the county buildings occupied for the Assizes, or for the Judges' lodgings, or occupied as a county court, or for a jail. In these latter cases it is difficult to maintain that the occupants are strictly the servants of the Sovereign, so as to make the occupation that of Her Majesty; but the purposes are all public purposes, of that kind which, by the constitution of this country, fall within the province of Government and are committed to the Sovereign, so that the occupiers, though not perhaps strictly servants of the Sovereign, might be considered *in consimili casu*."

This last observation would certainly apply to persons in the position of the Board of Control. But, independent of the character of the occupation, I am of opinion that the purposes of this institution are public purposes—that those purposes are determined by the origin and course of legislation and the actual and possible

(1) 11 H. L. Cas. 443. (2) 2 Ell. & Bl. 160. (3) 4 Ell. & Bl. 385.

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use of asylums in this country—that Government purposes must be extended to meet the necessary extent of the principle on which the exemption is founded, and to comprehend all cases in which the Government has assumed the entire management and control into its own hands—and that, notwithstanding decisions, displacing one or other element of the exemption, sufficient remains to bring the case within the rule of non-liability, even if the power of distinguishing such property in the Valuation Lists had not deprived the result of any practical importance as to the burthen upon the public. In my view, therefore, the judgment ought to be for the defendants.

Solicitor for the plaintiff: *W. Shannon.*
Solicitor for the defendants: *Sir P. Coll.*

A. E. R. J.

REG. (O'FERRALL) *v.* SHEEHAN (1).

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Jan. 21. Feb. 16, 17.

Poor Law—Audit—Allowance—Certiorari—*Poor Law* (*Ireland*) *Act*, 1838 (1 & 2 *Vict. c.* 56), *ss.* 94, 114—*Local Government Board* (*Ireland*) *Act*, 1871 (34 & 35 *Vict. c.* 109), *s.* 12—*Resolution of Guardians of the Poor applotting rate upon particular electoral division*—"*Order*" *of Guardians* (1 & 2 *Vict. c.* 56, *ss.* 114, 115). (2)

The Guardians of the Granard Union having, by resolution, charged against a particular electoral division certain legal expenses which (it may be here assumed) should have been borne by the Union at large, and the auditor having allowed the charge :—

Held (following *Reg.* (*Porter*) v. *Guardians Omagh Union*, 26 L. R. Ir. 619), that *certiorari* did not lie in respect of such allowance.

Per Gibson, J.: For the purpose of quashing an allowance, there is no right at common law to the writ.

Quaere : Was such resolution an "order" of the Guardians within 1 & 2 Vict. c. 56, s. 114?

CERTIORARI.

This was an application on the part of Edward More O'Ferrall to make absolute a conditional order, dated the 15th June, 1897, for a writ, directed to D. B. Sheehan, Local Government Board Auditor, to remove and quash certain orders and allowances made by him in his audit of the accounts of the Granard Poor Law Union, and his certificate, dated the 8th December, 1896, whereby, in his audit of the accounts of the Union for the half-year ending the 29th December, 1896, he had allowed as against the Knockanbaun Electoral Division of that Union, the sum of £59 0*s.* 5*d.*, on the ground that the allowance and certificate of the auditor were made without and in excess of jurisdiction, and that the sum so allowed (for election and other Poor Law expenses) against the Electoral Division was improperly so allowed, so far as same included legal and other expenses incurred by the Guardians of the Granard Union in certain

(1) Before PALLES, C.B., and MURPHY and GIBSON, JJ.

(2) See now 61 & 62 Vict. c. 37, s. 63.

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proceedings referred to in the affidavit of the now prosecutor grounding the conditional order, and on the ground that the allowance and certificate were bad, inasmuch as such legal and other expenses should have been charged against the Union at large.

The conditional order had been obtained on the affidavit of the prosecutor, who stated that he was rated for the relief of the poor in the Knockanbaun Division of the Granard Union to the amount of £615 2*s.*, the total valuation of that division being £1571 5*s.* The guardians having struck a rate of 11*d.* in the pound for the year ending September, 1896, on this division, Mr. More O'Ferrall had appealed to the County Court on the ground that the rate was excessive, and by order of that Court, dated 10th February, 1896, the rate was quashed with costs. Notwithstanding this, the guardians subsequently, in June, 1896, again struck a rate of 11*d.* in the pound for the year ending September, 1896, upon the division; from this Mr. More O'Ferrall had appealed, and the rate was again quashed with costs. Prior to the quashing of the first rate the guardians had proceeded to levy same against Mr. More O'Ferrall, who was compelled, under protest, to pay the sum of £27 15*s.* 6*d.* After the rate was quashed Mr. More O'Ferrall had frequently applied to the guardians for the return of this money, but without success, and had in a civil bill process obtained a decree at Sessions for the amount, with £12 13*s.* 10*d.* costs and expenses, and this decree was subsequently affirmed on appeal.

The accounts of the Union were audited by Mr. Sheehan in the month of December, 1896. In these accounts the item now in question, £59 0*s.* 5*d.*, appeared as an expenditure, under the head of "Election, Law, and other Poor Law Expenses," charged against the Electoral Division of Knockanbaun, and at the foot of the account Mr. Sheehan had certified, in the usual form:—"I hereby certify that this statement of receipts and payments of the several Electoral Divisions of the Granard Union is correct."

The prosecutor relied on the fact that thus the entire costs of these legal proceedings were charged solely against this Electoral Division, and therefore had necessarily to be paid substantially

by himself. He stated that this sum of £59 0*s.* 5*d.* included a sum of £29 3*s.* 11*d.*, amount of rates refunded to ratepayers; that there had been no exceptional legal expenses incurred in connection with the division during the half-year in question other than the expenses incurred by the guardians in their litigation with him; that in the two previous half-years this item of expenditure appeared by the accounts as £1 8*s.* 5*d.* and £1 12*s.* 7*d.*; and he submitted to the Court that the costs of these legal proceedings should be charged upon the Union at large, and that this burden had been imposed upon the particular Electoral Division, of which he paid almost half the poor rate, with the indirect object of punishing him for his success in the litigation uselessly caused by the guardians themselves, and of compelling him to pay on account of those proceedings a rate much in excess of that which they were brought to quash.

The auditor, in an affidavit filed as cause, stated that he had been informed and believed that the guardians had been acting under legal advice in defending the action referred to and in their appeal from the decision of the County Court Judge; that other similar proceedings had been taken by other ratepayers of the same division; that the guardians, acting as he was informed under legal advice, had, in November, 1896, passed a resolution that all the law costs incurred in connection with the Knockanbaun rate (including the costs of the proceedings to which the prosecutor was a party) should be charged upon the rates of that division; that, when auditing the accounts of the Union in December, 1896, he found that the costs of these proceedings were charged against this particular division; that Mr. Delaney, solicitor for Mr. O'Ferrall, attended before him and objected to the expenses connected with Mr. O'Ferrall's appeal against the two previous rates being charged against this division; that, having heard and considered what was urged by Mr. Delaney, he had decided that the costs and expenses incurred by the guardians in respect of the appeals against the said rates, and the other proceedings arising thereout, were properly chargeable only against the Electoral Division of Knockanbaun, and not against the Union at large, inasmuch as these proceedings arose only in relation to, and were solely conversant with, the rates made and payable in

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respect of the particular Electoral Division; and that, having so decided, he had certified accordingly.

Ronan, Q.C.; *Drummond*, Q.C., and *Patchell*, for the prosecutor.

Bourke, Q.C., and *D. F. Browne*, for the auditor.

Henry, Q.C., and *Law Smith*, for the guardians.

Feb. 17.

PALLES, C.B.:—

Three distinct matters have been argued before us:—First, whether this case is within the decision in *The Queen* (*Porter*) v. *Guardians of Omagh Union* (1); secondly, if not, is the resolution of the Guardians an "Order" within s. 114 of 1 & 2 Vict. c. 56; and thirdly, if not, did the Auditor act in accordance with law in allowing the charge for costs against the particular electoral division, instead of against the entire Union. A decision upon the first question in the affirmative would render it unnecessary to discuss the second and third; because the decision in *The Queen* (*Porter*) v. *Guardians of Omagh Union* (1) having been one capable of being brought to the Court of Appeal, and not having been appealed against, ought to be followed in this Court without question or criticism. I am of opinion that the present case is within that decision; and, for that reason, without offering any opinion upon the other questions which have been discussed, the cause shown ought, in my judgment, to be allowed.

In *The Queen* (*Porter*) v. *Guardians of Omagh Union* (1) two distinct questions arose: first, whether the rate in question there ought to have been quashed, as being retrospective. So far as the judgments relate to the character of the rate they are not in point here. The second question, however, viz. whether the auditor's allowance, by which he had allowed, as alleged, without legal authority, certain sums against a particular portion of the Union, raised, *inter alia*, the exact question which we have to determine here, viz. whether such an allowance is a judicial decision, which, if erroneous, can be quashed upon *certiorari*; and, as I

(1) 26 L. R. Ir 619.

read the judgments, the *certiorari* to bring up the allowance, as distinguished from the rate, was refused upon each of two grounds, one of which was that such a certificate was not capable of being questioned by that writ. In giving judgment, Lord Justice Holmes said (1):—"He" (the auditor) "is no doubt authorised, under certain circumstances, to surcharge persons who have made illegal payments; and his certificate in such a case is a judicial, or semi-judicial, determination of the facts, and therefore conclusive upon the person surcharged. Such a certificate may, upon proper grounds, be made the subject of a writ of *certiorari*, and be quashed by this Court." Such a certificate is different in character from that sought to be brought up here. Holmes, L. J., continues: "I am unable, however, to find any authority for holding that his personal examination of the accounts of the Union is of a judicial character. The Accounts Order of the Local Government Board defines his duties in language very similar to that which would describe the functions of the auditor of any private financial undertaking. His scrutiny seems to be intended as a safeguard against error; but there is nothing to warrant the notion that the certificate appended by him to the accounts amounts to a conclusive declaration that everything contained therein is absolutely correct, or to anything more than that he has failed to discover a mistake." Later on he adds: "It follows from this view, not merely that Mr. Pelly was justified in correcting the previous errors, but that *such certificates as are questioned in this case are not the subjects of certiorari at all*, and therefore that the second conditional order should be discharged."

To the same effect is the clear and forcible judgment of Gibson, J. "No doubt," he says, "audited accounts ought not to be lightly disregarded; but if they are affected by admitted errors, I am of opinion that the necessary corrections can be made in subsequent accounts, without the necessity of any *certiorari—a procedure which is not applicable to such a case as the present at all.*"

The conditional order should be discharged, with costs as regards the auditor. The guardians should, in my opinion, bear their own costs.

MURPHY, J., concurred.

(1) 26 L. R. Ir. 625.

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GIBSON, J. :—

This application for *certiorari* is addressed to the common law jurisdiction of the Court, and is resisted on three grounds :—first, the auditor's allowance was one in respect of which no statute gives the right of *certiorari*, and was not of such a character as could support *certiorari* at common law, as the case of *The Queen* (*Porter*) v. *The Guardians of the Poor of the Omagh Union* (1) decides ; secondly, the allowance was in pursuance of a resolution of the guardians which must be regarded as an order within section 114 of the Poor Law Act, and such resolution not having been quashed bound the auditor, who could not treat it as illegal ; thirdly, in only one instance (6 & 7 Vict. c. 92, s. 13), has Parliament directed the incidence of costs as between the Division and the Union, in all other cases the matter being left to the decision of the guardians, and the auditor having no right to review such decision; and, in any event, the award of the guardians and auditor, though it may be unfair and unjust, is not without or in excess of jurisdiction.

First, does *certiorari* lie on common law principles with respect to an auditor's allowance under the Poor Law Act? It is conceded that no statute purports to give the writ in such a case, and that the application must fail unless the audit is a judicial act, and the allowance is without or in excess of jurisdiction. The *Omagh Case* (1) decides that an audit generally is not questionable on *certiorari*. In deference to the full argument addressed to the Court I have reconsidered the matter afresh, and examined the authorities bearing on the subject. The result has been to confirm the opinion I expressed in the *Omagh Case* (1). As the question is of much practical importance, and the parties may desire to obtain the opinion of a higher tribunal, I shall shortly indicate the reasoning on which my judgment proceeds.

I shall first shortly notice the English statutes in *pari materia*, upon which there are many authorities which tend to elucidate the Irish code.

Under the 43 Eliz. c. 2, and the 17 Geo. 2, c. 38, an appeal as to rates and overseers' accounts lay to sessions, and questions of

(1) 26 L. R. Ir. 619.

law on such appeals were determined by the King's Bench on a case—*R.* v. *Gwyer* (1)—which under the Judicature Act may be the subject of appeal: *The Overseers of the Poor of Walsall* v. *The London and North Western Railway Co.* (2). The power of audit as to overseers' accounts was, by the 50 Geo. 3, c. 49, vested in Justices; but the first statutory creation of auditors that I know of was under the Poor Law Act, 4 & 5 Wm. 4, c. 76, the 47th section of which resembles section 94 in our Poor Law Act, and contains a similar clause as to the recovery of debit balances. There are also sections—sections 105 and following—corresponding to section 114 and subsequent sections in our statute; but the right of *certiorari* thereby given is restricted to Poor Law Commissioners' orders, whereas our section extends to orders of guardians. Under the 47th section, as to audit, it was held—*Reg.* v. *Poor Law Commissioners* (3)—that the Commissioners might direct the appointment of auditors with powers like those conferred by our statute. The decision of auditors acting under section 47 could be overruled by Justices holding an audit under 50 Geo. 3, c. 49: *Reg.* v. *Fouch* (4) and *Reg.* v. *Earl Dartmouth* (5); the former a case of allowance, the latter of disallowance. It was also settled that an order of the Commissioners, unless quashed under section 105 by the Queen's Bench, was binding: *Newbould* v. *Coltman* (6), and could not be disregarded by the auditor: *Reg.* v. *Greene* (7).

The earliest statute which created a specific right to *certiorari* in respect of illegal orders for payment was 7 Wm. 4, and 1 Vict. c. 78, s. 44, relating to borough funds. Upon this enactment there are many decisions, most of which relate to Orders of Council for payment of costs; e. g. *Reg.* v. *Liverpool* (8), and *Reg.* v. *Exeter* (9). The *certiorari* given by this statute lay against the Council Orders and not against the audit. In *Reg.* v. *Bridgwater* (10) it was accordingly held that, notwithstanding an auditor's allowance, the Court could quash an order for the payment of costs, even though the audit took place before the Act was passed.

(1) 2 A. & E. 216.
(2) 4 App. Cas. 30.
(3) 11 A. & E. 558.
(4) 2 Q. B. 308.
(5) 5 Q. B. 878.
(6) 6 Exch. 189.
(7) 17 Q. B. 793.
(8) 41 L. J., Q. B. 174.
(9) 6 Q. B. D. p. 135.
(10) 10 A. & E. 281.

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The first enactment enabling the audit itself to be questioned on *certiorari* was the 7 & 8 Vict. c. 101, s. 35, corresponding with our Act of 1871, sect. 12. Before this statute I can discover no trace of suggestion that an audit could be impeached on *certiorari*. Lord Campbell, in *Reg.* v. *Hunt* (1), explicitly states that an audit could not be so questioned in the absence of express enactment. Under this statute *certiorari* was given as to allowances as well as disallowances: *Reg.* v. *Great Western Railway* (2), and *Reg.* v. *Street* (3); and the remedy was applied where a parish was wrongly charged: *Reg.* v. *Winsford* (4). The jurisdiction was exercised by the Court very much on the lines on which it supervised and controlled the Sessions on cases stated on appeal. Cave, J., was of opinion, from the use of the word "erroneous" in section 35, that relief could be given where the allowance or disallowance was erroneous in any sense, though not absolutely illegal: *Reg.* v. *Haslehurst* (5). The creation of an express statutory right of *certiorari* against an auditor's allowance or disallowance supplies an argument that there was no title to the writ before.

I now turn to our Irish Poor Law code, which contains provisions as to audit, appeal, and *certiorari*; all material and requiring consideration. 1 & 2 Vict. c. 56, s. 94, provides for audit, declares that all payments and charges contrary to the Act or Orders of the Commissioners are illegal, and shall be disallowed; and directs the recovery of debit balances found due against accounting parties. Section 95 relates to the appointment of auditors, who are required to disallow all charges and payments which they *deem* to be illegal or unfounded, and to reduce such as they *deem* to be exorbitant. There is no enactment that the audit is to be final or conclusive; though possibly, if there is no excess of jurisdiction, it may be so with regard to the recovery of debit balances and surcharges.

The 106th and following sections give any person aggrieved a right of appeal against a rate. Such appeal can only be brought

(1) 6 Ell. & Bl. 411.
(2) 13 Q. B. 327.
(3) 18 Q. B. 682.
(4) 13 Q. B. 873.
(5) 51 J. P. 645.

within four months after the cause of complaint, and is subject to certain conditions. Suppose an auditor had passed an allowance to the prejudice of a ratepayer, would such ratepayer, on appeal, be precluded from challenging the auditor's decision, if erroneous in law? See *Reg.* v. *Hunt* (1), and *R.* v. *Bird* (2).

Under the 114th and subsequent clauses there is a restricted and carefully guarded right of *certiorari* given, not only as to Commissioners' Orders, but also as to orders of guardians. The section also extended to a rate, but this provision was at once repealed. The administrative inconvenience which might result from quashing an order is obviated by sect. 117, which preserves the validity of the order until notice of the Order of Court is given to the unions concerned.

In Ireland, there is no statutory limit of time, as there is in England, for bringing *certiorari* at common law. The audit here manifestly cannot be regarded as an order coming within sect. 114; and, even if it was such an order, the conditions prescribed by the Act have not been satisfied. If the audit can be quashed on *certiorari* at common law, such *certiorari* is free from any time limit, and from the conditions imposed with regard to statutory *certiorari* by the Poor Law Act, and the Local Government (Ireland) Act, 1871. The protection given by sect. 117, where an order is questioned, would not apply to the quashing of an audit. Can a ratepayer, who must appeal against a rate within four months, subject to important safeguards, attack an audit at any time, without security, and thereby perhaps throw the county finances into confusion? Why do the statutes create a limited *certiorari* if there was already a more effective writ at common law? It may be said that there is an implied *certiorari* in the case of persons charged with a debit balance, or a surcharge—as they might have no defence to a proceeding to enforce the amount. But, plainly, no such redress would apply where the error was one as to fact or amount. Even as to mistakes of law, is it quite certain that an auditor, whose duty it is to disallow charges which he *deems* to be illegal, exceeds his jurisdiction if he erroneously allows an illegal, or disallows a legal charge? If his erroneous

(1) 6 Ell. & Bl. 408. (2) 2 B. & Ald. 522.

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decision in such case is without jurisdiction, would it not be void, and might not the person charged resist payment on that ground? I express no opinion as to this. Supposing, however, that *certiorari* is available at the instance of the party charged, where direct personal liability is imposed, as in surcharges, &c., I can see no reason for extending it to a case of allowance like the present. The complete absence of authority in favour of any such remedy, the cases on corresponding English statutes, the express opinion of Lord Campbell, the absence of words making an audit final, the decision in *The Attorney-General* v. *Barrett* (1), that the Court may, under certain circumstances, go behind an audit made final by statute, and the creation of a special statutory *certiorari* in certain cases—all go to negative any common law right to the writ. It is unfortunate that the extensive powers of supervision and control given to the Court by statute in respect of a Poor Law audit in England have no counterpart here—the Act of 1871 only applying under the Public Health Act of 1878 and amending statutes.

I remain therefore of the opinion expressed by me in *The Queen* (*Porter*) v. *The Guardians of the Omagh Union* (2)—viz. that *certiorari* does not lie in respect of such an audit as the Court there had and now has before it. The other points noticed in my judgment in that case, namely, that the rate there, if illegal, could have been quashed on *certiorari*, and that the auditor had acted legally in disregarding previous audits, appear to me more doubtful than they did then; and, if these matters required decision here, I should like to reconsider them with reference to *Waddington* v. *Guardians, London Union* (3), and the reasoning of the old cases which decide, on the ground of convenience, that a poor rate cannot be quashed on *certiorari*: see Grady and Scotland, p. 135.

As I think that the conditional order must be discharged on the first point argued, it is not essential to decide the other two questions. If the resolution of the guardians was an "order," within section 114—which is the only place where an "order" of guardians is referred to at all in the Act—the auditor was bound by that resolution, and could not treat it as illegal: *Reg.* v.

(1) Ir. R. 3 Eq. 392. (2) 26 L. R. Ir. 619. (3) E. B. & E. 370.

Greene (1). This view would greatly impair the efficacy and value of an audit.

The last question is one of considerable difficulty. There is no express enactment directing the book-keeping between the division and the union in a case like the present; and counsel agree that the only relevant sections are the 44th and 62nd. There are several cases where wrong decisions of the auditor as to liability as to costs, etc., have been quashed on *certiorari*, but all of them have been under legislation giving a statutory right to the writ. The only express Irish provision regulating liability to costs, as between the union and the division, is 6 & 7 Vict. c. 92, sect. 13. Is the auditor's decision, in pursuance of the guardians' resolution—supposing it not to be an order—without jurisdiction? Or, is it merely inequitable and unjust?

Expressing no opinion upon these questions, or whether the applicant can get redress, by appeal against the rate or otherwise, I think that, upon the first ground, there is no jurisdiction to award *certiorari* to quash the auditor's allowance.

It is hardly necessary to point out that, upon *certiorari*, the Court can only strike out; it cannot substitute.

Solicitor for the prosecutor: *T. W. Delany.*
Solicitor for the guardians: *M. Kenny.*
Solicitor for the auditor: *J. E. O'Doherty.*

A. E. R. J.

(1) 17 Q. B. 793.

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REG. (DALY) *v.* JUSTICES OF COUNTY CORK (1).

Jan. 19, 20, 24. Feb. 25.

Summary jurisdiction—Procedure—Summons—Order—Costs—Several orders made upon one summons—Certiorari—*Summary Jurisdiction (Ireland) Act* (14 & 15 *Vict. c.* 92), *ss.* 20, 24—*Petty Sessions (Ireland) Act* (14 & 15 *Vict. c.* 93), *ss.* 20 (1), 22 (9).

The Irish Land Commission summoned Daly under 14 & 15 Vict. c. 92, s. 20, for trespass by goats, alleging in the one summons eight trespasses on several days. The Justices imposed fines in respect of each trespass, and made up eight distinct orders, with 5*s.* costs in each. On *certiorari*:—

Held, by Sir P. O'Brien, L.C.J., and Gibson, J. (*diss.* Murphy, J.), that these orders were bad; that the trespasses alleged in the one summons were one case; that there should therefore have been one order thereon, with costs not exceeding 20*s.*; and that accordingly, though the orders were on their face regular, the Court had jurisdiction, notwithstanding sect. 24 of the Summary Jurisdiction (Ireland) Act, 1851, to remove and quash them on *certiorari*, inasmuch as they were filled up misleadingly.

CERTIORARI.

This was an application to quash eight orders made by the Justices of county Cork, sitting at Coona Petty Sessions on the 1st September, 1897. The Irish Land Commission summoned Mrs. Catherine Daly for trespass by goats. There was but one summons taken out and served, alleging acts of trespass upon eight different days:—"Whereas a complaint has been made to me that you the defendant did allow goats, your property, to trespass on the complainant's lands at Kilcoran . . . as follows:—1st August, six goats; 2nd August, three goats," and so on. The Justices heard the matter (the defendant being present), and made eight separate orders, which were separately entered in the order book, imposing a fine in each, and 5*s.* costs in each.

R. Healy, for Mrs. Daly, now moved to make absolute a conditional order for a writ of *certiorari* to remove and quash these

(1) Before SIR PETER O'BRIEN, L.C.J., and MURPHY and GIBSON, JJ.

orders on the ground that the Justices had thus purported to award more than 20*s.* costs in one case.

M'Carthy Mahony, for the Irish Land Commission, showed cause.

Cur. adv. ult.

GIBSON, J. :—

The Land Commission summoned Daly under the Summary Jurisdiction Act, 1851, s. 20, for trespasses committed by certain goats, the summons charging eight cases of trespass on different days. The Justices, notwithstanding that there was only one summons, made eight substantive orders, with 5*s.* costs in each, amounting altogether to £2. The order book refers to the summons, but is entered up in the same way as if there had been eight separate summonses, each dealing with a distinct trespass. The applicant's counsel contends that it was illegal to sub-divide the summons, which was one complaint, and award separate costs exceeding £1, as, under sect. 22, sub-sect. 9, of the Petty Sessions Act, the complainant's costs were expressly limited to twenty shillings, whether the complaint related to several charges or not. For the Land Commission, it is argued that separate orders may be made on one summons containing several causes of complaint; that the limit of costs relates to each separate charge considered as a distinct complaint; and that, as the Summary Jurisdiction Act excludes *certiorari*, and the order book is on its face regular, there is no jurisdiction in this Court to quash the orders.

The case raises three questions. What is the construction of the Petty Sessions Act? What was the complaint on which the adjudication was made? And what is the effect of the provision taking away *certiorari*?

The summons is prescribed by the statute, and is process to enforce appearance. It contains what the statute describes as the complaint; it may be civil or criminal; and the complaint, like a summons and plaint, a bill of complaint, or indictment, may comprise several independent charges. Under the 39th section no objection lies to the summons for any defect in substance: *Rodgers* v. *Richards* (1), or in form: *Neal* v. *Devenish* (2), or for any

(1) [1892] 1 Q. B. 555. (2) [1894] 1 Q. B. 544.

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variance; and the 76th section of the County Court Act of 1877 contains wide powers of amendment of the summons, which is however recognised as the ordinary basis of jurisdiction.

Where one summons comprises several charges, there ought to be a distinct adjudication on each, just as in the case of an indictment; but such adjudications, though severable for some purposes, form part of one order or conviction made on the complaint, though such order or conviction may not be entire: *Conybeare's Case* (1); *Shea* v. *The Queen* (2). So far as I can discover, the course taken in this case of treating one summons with eight charges as identical with eight summonses, authorising eight substantive orders with costs, is without precedent. There was upon the summons only one complainant and one complaint; and, whether the complaint contains twenty charges or one, the restriction as to costs applies. No doubt the defendant's costs, as well as the complainant's, are subject to the same limit; and, it is said, it is unreasonable that a defendant, who succeeds on some charges, but fails on others, should be deprived of costs. It is replied that *Reg.* v. *Bayard* (3) is an authority for this; and the practice in civil bills is to the same effect. In my opinion, the supposed difficulty, if it exists—as to which I express no opinion—must be left to the good sense of the Bench, who may withhold costs from the complainant where he only succeeds in part.

The next question is, what was the complaint in fact upon which the orders were made? It has been laid down in a number of cases, of which *Reg.* v. *Hughes* (4) and *Kennington* v. *Daniel* (5) are recent examples, that summons is process, and that where the defendant appears the complaint may be varied and a new complaint put forward. In most of these cases there was a tacit waiver of objection, but the *ratio decidendi* of many of the Judges seems to affirm that, where the defendant is present, a complaint may be then and there made, without any antecedent summons or information, unless there be some statutory prohibition, and that upon such complaint there is jurisdiction to adjudicate, the danger of surprise being obviated by the power to apply for an adjourn-

(1) Crimes Act Cases, 1897, p. 317.
(2) 12 Ir. L. R. 153.
(3) [1892] 2 Q. B. 181.
(4) 4 Q. B. D. 614.
(5) 22 L. R. Ir. 667.

ment. The decision in *Reg.* (*Lalor*) v. *Justices of Queen's Co.* (1), where on the return the Court refused to quash the conviction, can only be accounted for on this principle.

The complaint, however, in this case was, I think, plainly the summons: it was upon that, and not upon eight complaints made *ore tenus*, that the adjudications were made. The Bench, accepting the construction of the Petty Sessions Act contended for before us by the Land Commission, considered that, upon the summons as it stood, they had jurisdiction to make distinct orders with costs. If this opinion was wrong, as I think it was, the error cannot be cured by the suggestion that the Justices might legally have made the orders without reference to the summons, and that the orders ought to be attributed to oral complaints, the summons being treated as spent when the defendant appeared. I must decline to support the orders by a fiction which I believe to be contrary to the fact.

If there were, therefore, no section prohibiting *certiorari*, I should think it clear that, if my construction of the Petty Sessions Act is correct, the orders made upon the summons were illegal. The complaint is a condition to the jurisdiction. A man cannot be found guilty of something which was not put forward as the subject of complaint. The cases of *Martin* v. *Pridgeon* (2), *Reg.* v. *Brickhall* (3), and *Blake* v. *Beech* (4), referred to without question as authorities in the leading text-books, and in the several editions of Smith's Leading Cases, lay down the principle distinctly, even though perhaps it may not have been correctly applied. In *Reg.* v. *Hughes* (5), Hawkins, J., expresses approval of the principle, and indicates that the conviction there referred to could have been quashed. *Reg.* (*Lalor*) v. *Justices of Queen's County* (1) is an authority to the same effect. The ultimate decision of the Court that the conviction should not be quashed, could not have proceeded upon any dispute as to the view of the law taken by Crampton and Perrin, JJ.

What is the effect of the 24th section of the Summary Jurisdiction Act, 1851, which takes away *certiorari*?

(1) 7 Ir. C. L. R. 438.
(2) 1 E. & E. 778.
(3) 10 Jur. (N. S.) 677.
(4) 1 Ex. D. 320.
(5) 4 Q. B. D. at p. 624.

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The Order Book is on its face regular and right, referring to eight orders made on eight complaints stated apparently as if upon eight summonses. Can the jurisdiction of the Court be baffled by a misstatement in the book?

In *Reg.* v. *Bickhall* (1) the complaint was for assault upon a constable in the execution of his duty, under one statute, and the conviction was for common assault under another statute—24 & 25 Vict. c. 100, the 72nd section of which excluded *certiorari*. The Court quashed the conviction—whether rightly or wrongly on the facts need not be considered—on the principle stated in *Martin* v. *Pridgeon* (2), viz. that there was no jurisdiction to convict of a charge not the subject of complaint. The same view was taken in *Reg.* v. *Deny* (3), where also *certiorari* was taken away. In each of these cases, which have been treated as binding authorities ever since, the Court, notwithstanding the frame of the order being correct, upset the conviction.

The case of *Reg.* (*Lalor*) v. *Justices of the Queen's County* (4) bears closely on the point. The prosecution was there assumed by counsel and the Court to be subject to the Summary Jurisdiction Act, 1851. Lalor, who was summoned as a witness in an assault case, was suddenly turned, to his amazement, into a defendant, and convicted of assault. The magistrates' affidavit stated an oral complaint made against Lalor without any objection on his part or request for time. On the argument of the conditional order, Crampton and Perrin, JJ., held that there was no sufficient complaint, and that there was therefore no jurisdiction to convict. The magistrates, in obedience to the writ, without filing any further affidavits, made a formal return, referring to the Order Book. It stated the names of Phelan and Lalor as defendants; and, under the column "Cause of complaint as set forth in the summons," the complaint was given as for assault and using threatening language. The book does not disclose the fact that the complaint was oral without any summons. On these materials, which I have examined the original records to ascertain, the Court unanimously, without assigning any reasons, declined to

(1) 10 Jur. (N. S.) 677.
(2) 1 E. & E. 778.
(3) 2 L. M. & P. 230.
(4) 7 Ir. C. L. R. 438.

quash the conviction. The apparent change of view can only be accounted for by the explanation that the Court, looking at the magistrates' affidavit and the conviction, held that the existence of a legal complaint had not been disproved. In the action of *Lalor* v. *Bland* (1), arising out of the prosecution, the plaintiff's counsel alleged that the Queen's Bench decided on the ground that evidence could not be accepted to contradict the record—the return. Pigot, C.B., entirely rejected that suggestion (p. 123), and obviously considered that the absence of a complaint would have been fatal to the conviction, even though *certiorari* was taken away. He held that the Queen's Bench, on a review of the materials for decision—including the conviction as well as the affidavits—must have determined that the conviction was within the Justices' jurisdiction, which it would not have been (in his view) if there had been no complaint. In the face of the magistrates' affidavit and the return, the Court, I think, was justified in refusing to quash the conviction.

The case of *Ex parte Hopwood* (2) cannot be regarded as inconsistent with *Reg.* v. *Brickhall* (3), or as an authority that the exclusion of *certiorari* disables the Court from inquiring into the existence and nature of the complaint. Where there is no appearance, the service of a summons, as prescribed, is an essential preliminary to jurisdiction: *Reg.* v. *Farmar* (4). In *Hopwood's Case* (2), had the service of any summons been *disproved*, and had there been no appearance, the decision ought to have been against the conviction. The jurisdiction vested in the Justices to inquire into the service of the summons—a condition precedent to jurisdiction to proceed *ex parte*—does not enable them by a wrong finding, to evade *certiorari*: *Reg.* v. *Smith* (5).

Had the Order Book disclosed the fact that there was only one summons and complaint, the orders would have been on their face erroneous. The illegality of the procedure cannot be screened from the cognizance of this Court by the Order Book being filled up in a misleading form.

The complaint was not for an offence, but for civil wrongs,

(1) 8 Ir. C. L. R. 115.
(2) 15 Q. B. 121.
(3) 10 Jur. (N. S.) 677.
(4) [1892] 1 Q. B. 637.
(5) L. R. 10 Q. B. 604.

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which might have been comprised in one aggregate charge. It is startling if, by separation of the charges, the Justices acquire jurisdiction to award 20*s.* costs for each, making £8 altogether—an amount which the County Court Judge could not award. No doubt, separate summonses might have been issued; but such a course might be regarded as oppressive; and it would have exposed the complainants to the risk of costs in any case where they failed.

MURPHY, J.:—

The complainants in this case issued a summons against the defendant, alleging that she had committed on eight different days trespasses on their lands. Both parties appeared in Court, and the Justices proceeded to investigate the charges made. They had, admittedly, jurisdiction to investigate them. The parties were duly brought before them, and the defendant had ample notice of the charges made. They proceeded to investigate separately into each alleged charge, and, finding each proved, they made a separate and distinct order in each. The orders are all good on the face, and clearly made with jurisdiction. But, it is said, the complainants placed all the charges upon one summons or notice; and, therefore, though properly investigated as eight different charges, they were only *one* before the Justices, or made only one "case"; and that, the costs of 5*s.* having been given on each order, the costs allowed in one case by the statute have been exceeded, and the orders are therefore all of no effect.

The summons or notice has, in my opinion, no such effect. It had done all that was intended to be done by it, when the defendant appeared and could not allege that she had not received notice of each charge as it came on to be investigated. I cannot see what extraordinary effect is to be given to a summons or notice calling on a party to attend at Petty Sessions to hear eight charges for trespasses, committed on eight different days, that it makes eight become one. But, it is said, can it be that the Justices could give with each order twenty shillings for costs? I see no grievance in this, when it is admitted that if eight summonses or notices had been served—all at the same time—

calling on the defendant to appear, on the same day—the Justices could have given, as costs, one pound in each order they made.

The orders were, in my opinion, all rightly made, on matters within the jurisdiction of the Justices; and I cannot agree that, by reference to a document that is not one of record, or at all a pleading in the case, the justice, that would have been done by the orders so made, should be made null and void through the interference of this Court.

SIR P. O'BRIEN, L.C.J. :—

Though I have read the cases referred to by counsel during the argument, and many others to which my attention has been since called, I prefer to deal with the question before us independently of decided cases. The question, in my view, will best be treated by a consideration of the provisions of the Act of Parliament, and the proceedings in the particular case before us—the summons, and the orders made thereon by the Justices. The Petty Sessions Act, 1851, section 22, says that "in all cases of summary jurisdiction, it shall be lawful for the Justices in adjudicating thereon to exercise the following general powers"; and one of those powers is that "in all cases the Justices may order" the losing party to pay "such sum, not exceeding 20*s*., as to such Justices shall seem fit." The language of the Act is clear and distinct—that the Justices have, in all cases, power to award that amount as costs, and no more. Now, let us take the summons, and consider whether it contains several cases, or complaints, or only one. To my humble judgment, it is absolutely clear that it contains but one. It alleges, no doubt, that trespasses had been committed on several occasions; but it is one case none the less. I might refer, if it were necessary, by way of analogy, to a summons and plaint alleging several acts of assault, which would still constitute but one action. The case before us is not, strictly speaking, a criminal case; it is conversant with trespass, for which damages are awarded on summary procedure. The orders of the Justices are bad. They have, by an indirect course, awarded 40*s*. for costs in this case—by assigning 5*s*. as costs in respect of each of the acts of trespass mentioned in the summons. They had no

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jurisdiction whatsoever to do this, and acted wholly in excess of their powers under the statute. But, it is said, there are eight orders—eight orders, apparently good upon their face—and we cannot quash them because they are right in form. It is however a well-established principle of law—on which it is not necessary to refer to authorities, such as the judgment of Denman, C.J., in *The Queen* v. *Bolton* (1), or to the judgment of Pigot, C.B., in *Lalor* v. *Bland* (2)—that Justices cannot give themselves jurisdiction by an incorrect statement of the actual facts. By the orders before us, the Justices, in effect, represent that there were several complaints, whereas there was only one. They could not, by this incorrect representation, give themselves jurisdiction. That is clearly laid down in the judgment of Lord Denman in *Bolton's Case* (1).

The complaint here was one complaint, and the Justices could legally make but one order upon it. Therefore, though *certiorari* is taken away, this Court can quash their orders as made without jurisdiction.

Solicitor for Daly: *Moloney.*

Solicitor for the Irish Land Commission: *W. Alexander.*

A. E. R. J.

(1) 1 Q.B. 66. (2) 8 Ir. C. L. R. 115.

BRADY *v.* WILLIAMS (1).

(1897. No. 3543.)

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1898.
June 14.

Practice—Sheriff—Fi. fa.—*Interpleader—Expenses of keeping cattle seized—R. S. C. Ir.: Orders LVII., Rr.* 15, 16, 17; *LXV., R.* 90—*Notice—Admission of claim.*

Under the General Orders LVII., Rules 15–17; LXV., Rule 90, a Judge has discretionary power to allow a sheriff not only costs but expenses up to the time of the admission of a claimant's title to goods seized under a *fi. fa.*

Where cattle were seized under a *fi. fa.*, and the sheriff served the execution creditor with notice of claim in Form 28, Appendix B, pursuant to Order LVII., R. 16, but the execution creditor declined to admit the claimant's title to any of the property until the hearing of an interpleader summons, when he admitted the claim as to some of the cattle:—

Held, that the sheriff was entitled to his expenses against the execution creditor of the keep of the cattle as to which the claim was admitted up to the time of the admission of claimant's title to them, even though he succeeded upon an issue as to the remainder of the cattle.

SUMMONS for sheriff's costs and expenses.

On 28th July, 1897, a writ of *fi. fa.* herein issued out of this Division at the suit of the plaintiff against the defendant for the sum of £150 debt, and £39 17*s.* 8*d.* costs; and the said writ was duly lodged with the sheriff of county Meath. On 2nd August, 1897, the sheriff seized certain cattle, namely, five two-years-old bullocks, one milch cow, and one calf on the defendant's land in the said county. On the same day the sheriff was served with a declaration made by Joseph Battersby, claiming the said cattle as his sole and absolute property. The sheriff thereupon served notice on the execution creditor, calling on him under the provisions of General Order LVII., R. 16, either to abandon the execution or dispute the claim, and requiring him to do so within

(1) Before KENNY, J.

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a limited time; in reply to which the execution creditor's solicitor (Mr. Marcus Purcell) wrote a letter as follows:—

5th Aug., 1897.

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DEAR SIR,—I received your notice and copy declaration. The plaintiff will not interfere in this matter with the cattle seized, so you can adopt whatever course you think proper. Please let me have your return on *fi. fa.*

Yours truly,

M. PURCELL.

JOSEPH LOWRY, ESQ., *Sub-Sheriff*,
Kells.

This letter was received by the sheriff on the 6th August. On the 8th August he received another letter from Mr. Purcell, dated the 7th instant, repeating the letter of the 5th, and stating, amongst other things, that the plaintiff would not dispute with anyone as to the seizure. On the 12th August the sheriff wrote to Mr. Purcell, requiring instructions, but received no reply. On the 19th August, 1897, the sheriff applied for and obtained an interpleader order, whereby it was ordered that he should withdraw from possession of the said cattle, except one cow and one calf: that an issue be tried (by consent before the County Court Judge of county Meath, at the then next Quarter Sessions in Kells) in respect of said cow and calf, in which issue the claimant should be plaintiff and the execution creditor defendant, the question to be whether the cow and calf, or either of them, were or was at the time of the said seizure the property of the claimant or not; and further, that the said sheriff should be at liberty to give up possession of the said cow and calf to the claimant on receiving satisfactory security therefor within ten days from the date of the said order, and in default that the said sheriff should sell the cow and calf and bring the proceeds into Court to abide further order, and that the question of costs and expenses should stand over until after the trial of the said issue. The order further directed that no action should be brought against the sheriff for the said seizure. The said issue was tried on 2nd November, 1897, before His Honor Judge Curran, who found that the cow and calf were the property of the defendant in the issue. The claimant, on 13th November, 1897,

lodged with the sheriff £12 as security. The execution creditor proceeded by Civil Bill process against the High Sheriff for 1897 for £50 damages for negligence, by reason of not seizing certain chattels, the alleged property of the defendant herein; and said process came on to be heard before the said Judge, and was dismissed on the merits; and notice of appeal was served. On 20th December, 1897, plaintiff's solicitor wrote to the sheriff, requesting a return to the said *fi. fa.*, and demanding payment of the £12 realized. On 18th December, 1897, the sheriff made a return to the *fi. fa.* that he had caused £12, representing the value of said cow and calf, to be levied off defendant's goods and chattels, and *nulla bona* as to the rest of the execution. The sheriff thereupon claimed £12 9*s.* 6*d.* expenses for the keep of the cattle seized by him; and on 1st February, 1898, he lodged said £12 in Court under said interpleader order.

The sheriff, in his affidavit to ground this summons, alleged that the plaintiff had no means to pay his expenses and costs, and that the defendant had been adjudicated a bankrupt. He also alleged that on 2nd February, 1898, his solicitor made an application to the said Mr. Purcell for his costs and expenses. Mr. Purcell did not reply thereto, but brought the matter under the notice of the County Court Judge, who stated that the £12 should not have been lodged as aforesaid, but should have been given to the plaintiff's solicitor in accordance with his order on the Interpleader issue; and on the 28th February, 1898, notwithstanding the said lodgment, the sheriff paid to Mr. Purcell the sum of £12, representing the value of the said cow and calf. The said plaintiff having so appealed from the said Civil Bill dismiss on the 28th February, 1898, his appeal was dismissed with costs.

P. A. O'C. White, for the sheriff:—

The main question is, is the sheriff entitled to the expenses of the keep of the five head of cattle from 2nd August, 1897, to 19th August, 1897, when he was ordered to deliver them up to the claimant? There is no doubt that he is entitled to the expense of the keep of the cow and the calf, the subject of the issue before the County Court Judge. As to the five head of cattle, the question might not have arisen if the plaintiff or his solicitor had

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complied with the provisions of Gen. Ord. LVII., R. 16. Immediately after the seizure and the claim, the sheriff served the usual notice on the execution creditor, requiring him to admit or dispute the claim. The plaintiff should have replied within four days whether he admitted or disputed; but instead thereof his solicitor on the 5th August wrote the letter already referred to, which did not comply with the Rule. Although again communicated with, the plaintiff's solicitor did not reply. Consequently the sheriff had no option but to apply for the interpleader order, and keep the cattle in the meantime. Once that order was made, directing him to give up the five head of cattle, he complied with the order, and was entitled to be reimbursed for any expense he was put to in the meantime, through no fault of his own. [Counsel cited Gen. Ord. LXV., R. 90 (Costs Rules).]

F. N. Greer, for the execution creditor:—

The sheriff is entitled to the expense of the keep of the cow and the calf, the subject of the issue in the County Court, but not to the keep of the five head of cattle given up to the claimant: *C.* v. *D.* (1); and *Prosser* v. *Mallinson* (2).

P. Law Smith, for the claimant:—

The sheriff is entitled to the keep of the cow and the calf, the subject of the issue; but is not entitled, certainly as against the claimant, to the keep of the five head of cattle, which were given up to him by order of the 19th August. The claimant, so far as the cattle were concerned, so far from being in default, had maintained his original claim; and consequently should not be visited in costs or expenses (3).

KENNY, J.:—

This case comes before me on the application of the sheriff for his costs and expenses reserved by the interpleader order of 19th August, 1897. The main point discussed has been the right of the sheriff to his expenses of the keep of the cattle, which by the

(1) W. N. 1883, p. 207. (2) 28 Sol. Journ. 411, 616.
(3) See *Hyland* v. *Lennox*, 28 L. R. Ir. 286.—[REP.]

order he was directed to give up to the claimant. The seizure took place on the 2nd August last, when the sheriff seized certain cattle. On the same day the claimant put in a claim to all the cattle so seized. The sheriff thereupon served notice on the execution creditor under General Order LVII., R. 16, calling on him either to abandon his execution or dispute the claim, and requiring him to do so within a limited time. The same rule provides that the execution creditor must within four days after receipt of the notice from the sheriff give notice in reply stating whether he admits or disputes the claim. No such notice was given by the plaintiff; but a letter was received by the sheriff on the 6th August. [His Lordship read the letter of 5th August.] This letter is one of a most unsatisfactory character. It deliberately abstained from either admitting or disputing the claim, and it left the sheriff to act entirely at his own risk, and on his own judgment. What was the sheriff to do? Was he to give up the cattle to the claimant, or was he to proceed to a sale, or was he to take an intermediate course, and try to determine how many beasts should be abandoned, and how many sold? On the 12th August he again communicated with plaintiff's solicitor, and applied for definite instructions, but received no reply. On 19th August, the interpleader order was made directing that five of the cattle seized should be given up to the plaintiff, and that an issue as to the ownership of the remainder,—namely, one cow and a calf,—should be tried in the County Court. The issue was accordingly tried before Judge Curran, who by order of the 2nd November, 1897, found that the claimant was not the owner of the cow and calf. The sheriff then claimed for the keep, not only of the cow and calf, but also of the five beasts, which by order had been given up to the claimant. His right to the expenses for the keep of the former is not denied, and the question on this motion arises as to the expenses of the keep of the five beasts from the 2nd to the 19th August.

Before the Judicature Rules the sheriff would not have been entitled to these fees. But the Rules of 1891 made a change. [His Lordship read General Order LVII., Rr. 15, 16 & 17; and General Order LXV., Rule 90 (Costs Rules).] In my opinion the effect of these Rules is to give a very wide discretion

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to the Judge not alone to deal with the costs of the order, but also with the expenses of the sheriff. The concluding words of Rule 16 seem to clearly imply that when the title of the claimant is admitted, an order can be made for payment of the sheriff's expenses incurred up to the admission of title. If so it follows that when the execution creditor does not admit the claimant's title until the hearing of the interpleader motion, the Judge can deal with the expenses incurred up to that date. I do not think that the cases cited have any application to this question. The cases of *C.* v. *D.* (1), and *Prosser* v. *Mallinson* (2), only deal with the costs of the sheriff, and not his expenses up to the date of the order.

In the circumstances of this case, I am of opinion that the sheriff is entitled to be paid the expenses for the keep of the cattle down to the date of the interpleader order.

The following is the curial part of the order:—

"IT is ordered that the said sum of £12 so lodged as aforesaid be paid out to J. Lowry, the Sub-Sheriff of the said county, and it is further ordered that Mr. M. Purcell, the plaintiff's solicitor, do in the first instance pay to the said Sheriff the sum of £12 9*s.* 6*d.*, as and for the expenses of the Sheriff of the keep of the cattle seized by him, and which expenses have been measured by one of the Registrars at the aforesaid sum, and that the said plaintiff's solicitor do have over against the said claimant J. Battersby the sum of £6 15*s.*, being so much of the said sum of £12 9*s.* 6*d.*, as represents the keep of the cattle, the subject-matter of the issue tried by Civil Bill before the County Court Judge, and be at liberty in default of payment thereof by the said J. Battersby to issue execution therefor, and for 10*s.* 6*d.*, to be added thereto for his attendance to measure expenses in the name of the plaintiff in this action; and it is further ordered that in default of payment of the said amount by a levy thereof against the said J. Battersby as aforesaid, the said plaintiff do pay to his said solicitor, M. Purcell, the said sum of £6 15*s.*, and 10*s.* 6*d.* expenses ordered to be paid by the said J. Battersby, and also that the plaintiff do in any event pay to his said solicitor, M. Purcell, the sum of £12 9*s.* 6*d.*, being the sum which the said M. Purcell is so directed to pay in

(1) W. N. 1883, p. 207. (2) 28 Sol. Journ. 411, 616.

the first instance to the said Sheriff; and it is further ordered that the said claimant, J. Battersby, do pay to the plaintiff herein the sum of £6, being that part of the said sum of £12 so applied in payment of costs, and that the said claimant do also pay to the said Sheriff the sum of £4 4*s.* as and for the costs of the said order of the 19th Aug., 1897, and do also pay to the said Sheriff the sum of £4 4*s.*, and 13*s.* 4*d.*, for his attendance to measure expenses, and to the plaintiff the sum of £3 3*s.* as and for their respective cost of this application."

Solicitor for the sheriff: *W. D. Sullivan.*
Solicitor for the plaintiff: *M. Purcell.*
Solicitor for the claimant: *J. T. Lowry.*

J. P. B.

ADAMS, TENANT; DUNSEATH, LANDLORD (No. 2) (1).

Land Com. 1898.
April 27.
July 26.

Fair rent—Increased letting value—Allowance to the tenant in respect of improvement work—Balance of increased letting value—Right of the landlord thereto—Ulster custom.

(1) The tenant is entitled to a fair and liberal annual allowance in respect of the present capital value of his improvement work.

(2) In ascertaining such capital value and allowance, regard must be had not merely to the expenditure of the tenant in moneys numbered or labour, but to the skill he has employed in developing the latent resources of the soil.

(3) If, after a fair and liberal allowance has been made in respect of the tenant's improvement works, any surplus or balance of increased letting value remains, such surplus or balance is the property of the landlord, whether the holding is subject to the Ulster Custom or not.

IN this case the tenant had reclaimed 16 acres of land, and the Sub-Commission having estimated the cost of such reclamation, and the increased letting value resulting therefrom made a deduction from the rent to be paid by the tenant at the rate of 5 per cent. upon the estimated cost of reclamation. This deduction did not absorb the entire increased letting value, but a balance or

(1) Before MEREDITH, J., and WRENCH and the Hon. GERALD FITZGERALD, Q.C., Commissioners.

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surplus still remained over which the Sub-Commission divided equally between the landlord and the tenant.

The question in the present appeal was whether the Sub-Commission were right in principle in so dividing the balance or surplus of increased letting value equally between the landlord and tenant; and if not, how that balance or surplus was to be dealt with.

Serjeant Dodd (with him *E. Greer*), for the tenant:—

We submit that no question in the present case can arise as to the balance of increased letting value, inasmuch as the deduction allowed by the Sub-Commission in respect of the tenant's improvement work is altogether inadequate. The increased letting value, which has been estimated at between 6 and 6½ per cent., is no more than a fair return to the tenant for the work he has executed. Moreover, the Ulster Custom applies to the holding, and on an estate, where the Ulster Custom prevails, the landlord at any rate in early times never sought to exact anything from the tenant in respect of the labour or capital expended by him.

Even assuming that a proper allowance has been made to a tenant for his improvement work, and that the Ulster Custom does not apply to the holding, a tenant according to the judgments in the former case of *Adams* v. *Dunseath* (1) has an interest over and above the allowance so made to him in respect of the improvements he has affected. That interest is more than sufficient to absorb any balance of increased letting value that may remain.

Matheson, Q.C. (with him *Caruth*), for the landlord:—

The only question in this case is what allowance is to be made to the tenant in respect of his improvements in fixing a fair rent for the holding. The only allowance a tenant can get in respect of these improvements is a fair interest upon their original cost in so far as the original cost exists at the time of fixing the fair rent. In *Adams* v. *Dunseath* (1) the Judges all agreed that "improvements" in the Act of 1881, sect. 8, sub-sect. 9, meant the same thing as "improvements" in the Act of 1870, sect. 70, and that the

(1) 10 L. R. Ir. 109.

only improvements in respect of which a tenant could get an allowance in fixing a fair rent were the same improvements for which he would be entitled to claim compensation on quitting his holding. This establishes our contention that a tenant is only entitled to a fair percentage on the original cost of his improvements. If the tenant is allowed anything more than this, he is given an interest which does not exist in law, something in the nature of an occupation interest which has recently been expressly repudiated.

E. Greer, in reply.

MEREDITH, J.:— July 26.

In this and several other cases heard at Belfast before Mr. Justice Bewley, Mr. Commissioner Wrench, and Mr. Commissioner Fitz Gerald, the Court found as a fact that portion of the land comprised in the several holdings had been reclaimed by the tenants or their predecessors in title, and that the letting value of the portion so reclaimed had been thereby increased. The question as to the mode in which this increased letting value should be dealt with was reserved for further argument, and it has fallen to my lot to take part in the decision of the point thus reserved. The method employed by the Sub-Commissioners appears to have been as follows:—They have estimated the cost of the reclamation effected by the tenants, and the increased letting value due thereto, and they have made a deduction from the rent based upon an allowance to the tenant by way of interest at the rate of 5 per cent. upon the estimated cost of the reclamation, and a further allowance equivalent to half the residue of the increased letting value. In other words, after deducting from the increased letting value a sum equivalent to 5 per cent. on the estimated cost, they have divided the surplus or balance of increased letting value equally between the landlord and the tenant. The Sub-Commissioners have not stated in express terms that the deduction from the rent has been arrived at in this way, but I think it is obvious from a consideration of the figures that this has been the course adopted. In my opinion the Sub-Commissioners were wrong in principle. The conclusion I have arrived at as to the

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rights of the landlord and tenant in cases like the present is as follows:—The tenant is entitled to a fair and even a liberal return by way of annual allowance in respect of the present capital value of his improvement work. In ascertaining that capital value and measuring that allowance regard must be had not merely to the expenditure of the tenant in moneys numbered or labour (which is money's worth), but to the skill of the tenant employed in the development of the latent or dormant resources of the soil. If the amount of the increased letting value does not exceed the amount of the annual allowance to the tenant, measured in the way I have indicated, the tenant absorbs and is entitled to the entire of the increased letting value. Of course the allowance to the tenant never can exceed the entire amount of the increased letting value. But if, after a fair and liberal allowance has been made in respect of the tenant's improvement works, any surplus or balance of increased letting value remains, that surplus or balance in my opinion is the property of the landlord, and he is entitled to have a fair rent fixed in respect of that portion of his property in precisely the same manner, and upon the identical principles, in which and upon which a fair rent is fixed by this Court in respect of those portions of his arable or pasture lands, as to which no question of improvement arises. I can find no reason and no justification for the allocation of this portion of the landlord's property between him and the tenant. It was argued by Serjeant Dodd that the decision of the Court of Appeal in the historic case of *Adams* v. *Dunseath* (1) (the selfsame landlord and tenant, and the selfsame holding now before the Court) afforded warrant and authority for the action of the Sub-Commissioners. I can only say that I am unable to take that view of the decision. The Court of Appeal adopted Mr. Butt's view as to the origin and elements of increased letting value. At page 128 of Mr. Butt's treatise, he says:—"If, for instance, the letting value of a farm was increased by £10 a-year, . . . it may be urged that this value is created by the industry or expenditure of the tenant, and that, therefere, he is entitled to regard the property he has so created as his own. A little reflection will show that such a mode of estima-

(1) 10 L. R. Ir. 109.

tion would be unjust. The additional value is not the creation solely of the tenant. It is the creation partly of the skill and expenditure of the tenant, and partly of the inherent capabilities of the soil. It so happens that these inherent capabilities when undeveloped do not always enter into a calculation of the letting value of land, as will at once be understood from the fact that it has frequently happened that land valued at 2*s.* an acre has been by a trifling expenditure made worth as many pounds. There are instances not uncommon in which the reclamation of bog or land on the edges of moor or lakes has repaid the whole expense of the process in the crops that were raised in the course of it. In instances like those the property is not created by the expenditure of the tenant but by the latent powers of the soil; those powers are the property of the landlord, and he has a right to have them returned to him when the tenant's interest expires." The Court of Appeal drew the clearest distinction between "improvement works" and "increased letting value." The Court held that sub-section 9 of section 8 of the Act of 1881 applied only to improvement works (as defined by section 70 of the Act of 1870), and not to increased letting value. "All the Judges held, and necessarily held, that 'improvements' must receive the definition given to it by the Act of 1870; but, except the Lord Chancellor, they held that the true basis of the enactment, in the 9th sub-sect., was the right to receive compensation on quitting under the Act of 1870": *per* Walker, C., in *Mairs* v. *Lecky* (1). Since the decision in *Adams* v. *Dunseath* (2) many and great changes in the Land Law Acts have been made, but the only provision in any of the amending statutes, which modifies the decision of the Court of Appeal as to the meaning of the term "improvements" is in sub-section 3 of section 1 of the Act of 1896. "No rent shall be allowed or made payable in respect of an improvement made by the tenant on a holding, by reason only of the work constituting such improvement not being suitable to the holding." The definition in the Act of 1870 required that the work should not merely be ameliorative but should also be suitable; the 3rd sub-section of section 1 of the Act of 1896 (while amending the law as regards

(1) [1895] 2 I. R. at p. 480. (2) 10 L. R. Ir. 109.

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suitability) seems to me to emphasize the decision of the Court of Appeal in *Adams* v. *Dunseath* (1), with respect to the meaning of the term "improvements," for the very wording of the sub-section shows that "improvement" means improvement work. The term "improvement" therefore still means "improvement work" as distinguished from "increased letting value." With regard to the tenant's improvement works and the tenant's rights under sub-sect. 9, sect. 8, of the Act of 1881, the Court of Appeal spoke with no uncertain sound. I take it to be clearly established by the judgments in *Adams* v. *Dunseath* (1) that the tenant has by virtue of sub-section 9 of section 8 of the Act of 1881 (which must now be read in connexion with sub-section 3 and sub-section 7 of section 1 of the Act of 1896) the first claim upon the increased letting value. It seems to me to follow from the decision that no rent can be allowed in respect of any fraction of the increased letting value until the tenant who has executed the improvement works has been scrupulously protected in the enjoyment of a just and even of an ample return in respect of the present value of the additional capital which his improvements have added to the holding. But after this has been provided for there may remain, as there does in the present case, some surplus or balance of the increased letting value. The Court of Appeal recognised this, and (as I read their judgments) decided that it must be dealt with under sub-section 1 of section 8 (Act 1881), or in other words (as I apprehend), that we must fix a fair rent in respect of it, "having regard to the interest of landlord and tenant respectively, and considering all the circumstances of the case, holding and district." Fixing a fair rent, Mr. Matheson contends, and in my judgment rightly contends, cannot mean dividing the property between landlord and tenant, and thus for all practical purposes exempting the tenant from all rent in respect of the moiety allotted to him. Nor (in my judgment) can the tenant whose rights under sub-section 9 of section 8, in respect of improvements, have been adequately secured, claim or be held entitled to a further allowance or deduction from his rent in respect of his interest in the selfsame improvements. It cannot be denied, however, that the language used

(1) 10 L. R. Ir. 109.

by some of the Judges of the Court of Appeal appears to indicate that even after a fair and liberal return has been made to the tenant in respect of his expenditure and skill in effecting improvement works, he might still be found entitled to a share of the surplus or balance of increased letting value and consequently to a further allowance or deduction from what would otherwise be the fair rent of the holding. I think the explanation suggested by Mr. Matheson is the true one. When *Adams* v. *Dunseath* (1) was decided the Land Act of 1881 was in its infancy, and the Court of Appeal foresaw that many and difficult questions would arise under the 1st sub-section of sect. 8. The problem of occupation interest was, I think, in the contemplation of some of the members of the Court. Indeed Lord Justice Fitz Gibbon states expressly that he guards himself against being supposed to prejudge the question. At page 179, after stating the figures and the proportion of value attributable to the improvements, that is the improvements in the particular case under consideration, he says: "The proportion of value attributable to the improvements, therefore, varies from nearly 50 per cent. to over 20 per cent. (excluding the house) of the gross letting value of the holding. It will of course be understood that before any part of this difference is allowed to the landlord, the Land Commission should estimate the present value of the improvement works, or, as Mr. Butt well expresses it, should ascertain what would it cost the landlord to put the farm into its present condition, supposing the improvements had never been executed, and upon that amount the improving tenant is entitled to a just and I would add a liberal return, while (except in respect of considerations of reduction and compensation) the landlord should not be allowed any rent whatever. In respect of the full present value of the additional capital which his improvements have added to the holding the tenant should be scrupulously protected in the enjoyment of a just and even of an ample return, but after this has been provided for, the landlord is equally entitled to the return derived from the more active and profitable use of his interest in the holding. I guard myself, as the Master of the Rolls has done, from saying

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that the whole surplus profit belongs to the landlord, as I do not desire to prejudge the question, which is not now before us, but which may hereafter arise, whether the tenant under the Acts of 1870 and 1881 has not an interest in the holding over and above his statutory tenure and his rights to compensation. Thus far, however, our unanimous statement of the rule appears to me to lead—that the landlord is entitled as part of the fair rent of the holding to so much of any increase of letting value consequent upon improvements, after making a fair return to the tenant upon the value of the improving works, as is derived from the utilisation of the landlord's interest in the inherent qualities, advantages and resources of the holding." Mr. Matheson admits that if the so-called "occupation interest" could be legitimately taken into account by way of deduction in fixing a fair rent the whole situation would be changed, and he argues that the expressions relied on by Serjeant Dodd in support of his argument were employed with the object of avoiding even the appearance of determining an important question which was not before the Court of Appeal. I am inclined to agree with Mr. Matheson. However this may be, we have now decided in a series of cases that no allowance or deduction in respect of occupation interest can be made from what would otherwise be the fair rent of the holding, and so far as this Court is concerned that aspect of the case is closed.

I have endeavoured to ascertain and apply to the decision of the present case the principles laid down by the Court of Appeal in *Adams* v. *Dunseath* (1). If I have misread or misinterpreted the judgments of any or all of the great Judges who took part in that decision it is not from want of an anxious and honest desire to arrive at a correct conclusion.

The argument before us mainly proceeded upon the basis that *Adams* v. *Dunseath* (1) ruled this case one way or the other. But Serjeant Dodd put forward an alternative case. The original case of *Adams* v. *Dunseath* (1) (he pointed out) was decided on the assumption that the holding was not subject to the Ulster Custom. Strange and remarkable as it may appear, in truth and in fact the

(1) 10 L. R. Ir. 109.

holding *was* subject to the Ulster Custom, as the landlord admitted before the Sub-Commission when the rent for the second statutory term came to be fixed and as his counsel admitted on the rehearing. However, after the most careful consideration, I have come to the conclusion that this circumstance does not affect the question now before us or deprive the landlord of his right to a fair rent in respect of so much of the increased letting value as is justly due to the inherent capabilities of the soil. Serjeant Dodd suggested that there were some estates in Ulster upon which the custom obtained of exempting from rent the entire of the increased letting value. We have never had proof of the existence of any such incident of the custom, and certainly no evidence was offered in the present case of any such usage or any such incident of the custom upon an estate. This Court has already decided in *Markey* v. *Gosford* (1) and *Ripley* v. *Mac Naghten* (2), that so far as regards occupation interest the tenant of a holding subject to the Ulster Custom, who comes into Court to have a fair rent fixed stands in the same position as a tenant outside Ulster. I hold that in estimating a fairly-valued rent as between landlord and tenant in Ulster, it would not be a breach of the Ulster Custom for the landlord to claim, and insist, that he was entitled to a fairly valued rent in respect of so much of the increased letting value as is justly due to the inherent capabilities of the soil. We have not been referred to any authority to the contrary. Indeed in support of my view, that the existence of the Ulster Custom does not affect the question for decision in this case, I may, I think, refer to page 176–7 (10 L. R. Ir.), where Lord Justice Fitz Gibbon says, referring to the question that had been raised by Lord Chancellor Law, as to the Ulster Custom, "It may be that owing to the lease or otherwise, no usage affected this holding, or it may be that no substantial difference of rights is involved in the distinction, and I am not aware"—these are the words on which I lay stress, as they seem to me to point towards the same conclusion at which I have arrived in this matter—"and I am not aware that any variety of the Ulster Custom excludes or affects the right of the landlord to a fairly valued rent ascertain-

(1) 31 I. L. T. R. 97. (2) Not yet reported.

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able from time to time upon principles at least analogous to those guiding the determination of a fair rent under the Act of 1881."

There is only one other matter that I would refer to before closing my judgment. After the Act of 1881, after the judgment and decision in *Adams* v. *Dunseath* (1) was almost as well known in England as it was in Ireland, the Agricultural Holdings Act of 1883, the English Act, was passed. The first section of that Act deals with improvements and compensation for improvements. "Subject as in this Act mentioned, where a tenant has made on his holding any improvement comprised in the first schedule hereto, he shall on and after the commencement of this Act be entitled on quitting his holding at the determination of a tenancy to obtain from the landlord as compensation under this Act for such improvement such sum as fairly represents the value of the improvement to an incoming tenant; provided always, that in estimating the value of any improvement in the first schedule hereto there shall not be taken into account as part of the improvement made by the tenant what is justly due to the inherent capabilities of soil." I think that the law in England as stated in that section is that the inherent capabilities of the soil remain the property of the landlord, and I think that the law in Ireland is the same. The Court has fixed the fair rents in this and the other cases in accordance with the principles laid down in my judgment. In *Adams* v. *Dunseath*, the first case in the list, the former rent was £32 15*s.*; the rent fixed by the Sub-Commission was £17. There was some difference between the landlord's and tenant's valuers as to the net fair rent. On behalf of the tenant Mr. Kennedy estimated the fair rent at £16 8*s.* 2*d.*, Mr. Pinkerton at £15 15*s.* On behalf of the landlord Mr. M'Ilwaine made the net fair rent, including the turbary, £21 9*s.* 2*d.*, and Mr. Thompson estimated it at £24 7*s.* 1*d.* Under all the circumstances of the case the Court has come to the conclusion that the tenant is entitled to credit in respect of 16 acres of land reclaimed. The present capital value of the improvement ascertained on the principles I have mentioned (taking into consideration the ex-

(1) 10 L. R. Ir. 109.

penditure and skill of the tenant) is estimated at £6 an acre, making in all £96. The increased letting value due to the improvement is estimated at £6 15*s.* per annum, and the deduction from the rent on account of the improvement is estimated at 5 per cent. upon £96, in all £4 16*s.* The rent now fixed by the Court is £19 2*s.* We think under the circumstances of the case each party should abide his own costs of the argument.

Solicitor for the tenant: *J. K. Currie.*
Solicitor for the landlord: *J. A. Caruth.*

J. MAC M.

RE THE ATTORNEY-GENERAL AND THE ATHENRY & TUAM EXTENSION TO CLAREMORRIS RAILWAY CO., LTD.; IN RE A CERTAIN PRESENTMENT OF THE MAYO GRAND JURY. KELLY AND ANOTHER, SUPPLIANTS; THE QUEEN, RESPONDENT (1).

Baronial guarantee—Treasury subvention—Certificate of arbitrators under Tramways (Ireland) Act, 1883*—Excess of jurisdiction—Error in certificate—Grand Jury—Presentment—Fiat of Judge of Assize*—Certiorari—*Tramways (Ireland) Act,* 1883 (46 *&* 47 *Vict. c.* 43), *s.* 6.

The Grand Jury of county Mayo made a presentment guaranteeing a certain dividend on the share capital (£98,000) of a certain Light Railway Company—the undertaking to be worked by the W. & L. Railway Company, who were to retain 50 per cent. of the gross profits, and pay the other 50 per cent.—or, as a minimum, £51 a week—to the new Company. The guarantee was not to commence to accrue until the undertaking was fully completed, taken over, and opened for traffic.

The presentment was ratified by Order in Council (confirmed by statute, 54 Vict. c. i), by which a subvention from the Board of Works was guaranteed in case of the county.

The line was opened for traffic on the 1st May, 1894, but, upon the ground that the undertaking was not fully completed, the arbitrators (appointed by the Board of Trade under section 6 of the Tramways (Ireland) Act, 1883) made no certificate for the half-years ending 31st October, 1894, and 30th April, 1895.

On the 20th December, 1895 (the undertaking having been meanwhile fully completed and taken over), the arbitrators made up their first certificate, for the

(1) Before PALLES, C.B., and O'BRIEN and ANDREWS, JJ.

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half-year ending 31st October, 1895, and therein erroneously included, under expenditure, outlay (£819 13*s.* 9*d.*) applicable to the two preceding half-years (though they only took into account the gross receipts of the particular half-year), and, as the result, certified to a partial insufficiency of net receipts to meet dividend of £1773 19*s.* 2*d.*

The Grand Jury presented and levied this sum in 1896 (the presentment being fiated without opposition), and applied to the Board of Works for their subvention of a moiety of this amount. Investigation disclosing the error, the Board refused to contribute more than a moiety of the correct amount (£1773 19*s.* 2*d.*, less £819 13*s.* 9*d.*).

This the Grand Jury declined to accept, and a Petition of Right was instituted which resulted at the trial in judgment for the suppliants that the Board should pay a moiety of the sum certified for and presented.

Meanwhile the Crown obtained a writ of *certiorari* removing the certificate and presentment into the Court for its consideration.

On new trial motion of the petition, and argument on the return to the writ:—

Held (Palles, C.B., dissenting), that—the Court being bound to entertain evidence upon the question whether the arbitrators had exceeded their jurisdiction, and it appearing that the arbitrators had transgressed the limit of their authority in dealing with expenses antecedent to the half-year in regard to which their certificate was given, and before the guarantee commenced to accrue—that certificate, and with it the presentment founded thereon, should be quashed on *certiorari*; and that (on the Petition of Right) the judgment for the suppliants should be altered into a judgment for the lesser amount.

Petition of Right and Certiorari.

This was the hearing of a new trial motion of a Petition of Right, and an argument on the return to a writ of *certiorari*, taken together by order of the Court. The question at issue in the two matters was the same.

The Athenry and Tuam Extension to Claremorris Railway Company, Limited, was incorporated, under the Tramways (Ireland) Acts, for the purpose of making a railway between Tuam, in the county of Galway, and Claremorris, in the county of Mayo. In 1890 the Grand Jury of the county of Mayo made and passed a presentment, whereby it was, amongst other things, declared that the entire of the baronies constituting the county of Mayo should guarantee a dividend in perpetuity at the rate of 4 per cent. on the share capital of the Company, being paid-up capital as defined by the Act of 1883—provided that such capital should not exceed £98,000 and that the Government subvention of 2 per

cent. should apply to the whole of the said capital, and that the said guaranteed dividend should not commence to accrue until the undertaking should be fully completed and taken over by the Waterford and Limerick Railway Company, and opened by them for public traffic. This presentment contained a further proviso that a working agreement (subsequently concluded), should be entered into between the promoters (the Extension Company), and the Waterford and Limerick Railway Company, containing a stipulation to the effect that the Waterford and Limerick Railway Company should, for a term of not less than twenty years, work and maintain the undertaking at or for a sum of 50 per cent. of the gross receipts, the balance of 50 per cent. (subject as hereinafter) to be paid to the Extension Company, and applied subject to the Tramways (Ireland) Act, 1883; provided that the sum to be paid by the Waterford and Limerick Railway Company to the Extension Company should not in any half year be less than £51 per week.

The Company obtained an Order in Council, but, owing to opposition which ensued both before the Grand Jury and before the Privy Council, it became necessary, under the Tramways Acts, to have that Order confirmed by Parliament (54 Vict. c. i).

The 8th clause of the Order in Council provided that the dates for payment of dividends should be the 1st May and 1st November, the first dividend to be payable on the gale day next occurring after the undertaking should be "fully completed, and taken over by the Waterford and Limerick Railway Company, and opened by them for public traffic."

Clause 9 of the Order provided that—"The Board of Trade shall, on or before the 1st day of May or 1st day of November, whichever shall first occur after the opening of the said Light Railway for traffic, and from time to time afterwards as any vacancy shall occur, appoint for the same county the arbitrators provided by the 6th section of the Tramways and Public Companies (Ireland) Act, 1883, and the promoters shall, on or before the 20th day of June and the 20th day of December, in every year, make out and deliver to the said arbitrators an account for the then preceding half-year, ending on the said 30th day of April or 31st day of October, showing the amount

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of the paid-up capital of the said undertaking, and a further account of all the receipts of every nature and kind for the then preceding half-year ending on the said 30th day of April or 31st day of October, arising in any manner from the said undertaking, and the expenditure thereof; and the said arbitrators shall deliver their certificate in writing to the Secretary of the Grand Jury of said county, before the 1st day of June and 1st day of December in each year, ascertaining and determining the amount in each half-year payable under said presentment by the said baronies in respect of the said undertaking; and the said certificate shall be laid by the said Secretary before the Grand Jury of the said county at the Assizes next after he shall have received the same, and the sum mentioned in said certificate shall be presented for and raised and paid to the promoters and applied by them in the manner provided by the 7th section of the said Act, in respect of the certificate therein mentioned."

Clause 14 provided—"When, in any half-year after the opening for traffic of the said Light Railway, the said baronies have paid to the company any sums in respect of guaranteed dividend, exclusive of any sum paid in respect of the completing, working, or maintaining of the undertaking, the Treasury shall, if and so long as the railway is maintained in working order and carries traffic, authorize the Board of Works, out of moneys provided by Parliament, to pay to the treasurer of the county, to be put to the account of the said baronies in the proportion of the sums paid by them, a sum amounting to one-half of the sums so paid by them in respect of guaranteed dividend, exclusive as aforesaid, during such half-year, but so, nevertheless, that the sum so authorized to be paid shall not exceed a sum equal to interest at the rate of 2 per cent. per annum on the paid-up capital, limited as aforesaid."

Clause 33 provided that the promoters should keep books of account, &c., and that these and all books and vouchers necessary should be produced for inspection by such persons as should from time to time be appointed, by the Grand Jury of the county of Mayo, for the examination thereof, and also of such persons as the Treasury might for the like purpose from time to time appoint, and also of the arbitrators appointed under section 6 of the Tramways (Ireland) Act, 1883.

Clause 34 provided that the accounts should be audited once in each year by some person to be appointed by the Grand Jury of the county of Mayo, whom they should appoint for the purpose at each Spring Assizes, and that it should be the duty of such auditor, on or before the 15th May following his appointment, to furnish a statement of the result of the audit, with a summary of the accounts of the undertaking since the last preceding audit, to the Commissioners of Public Works in Ireland, and to the Secretary of the Grand Jury.

Section 6 of the Tramways (Ireland) Act, 1883 (46 & 47 Vict. c. 43), provides that—

"For the purpose of ascertaining the gross receipts and the net receipts from the tramway, and the sums (if any) which any barony shall pay in any half-year as provided by the Order in Council, and for the other purposes mentioned in this Act, the Board of Trade may, during the continuance of the guarantee, from time to time appoint as arbitrators the County Surveyor acting for the time being in the county in which such barony is situate, and two other persons to be selected by the Board of Trade; . . . and such arbitrators shall from time to time ascertain and determine the amount of the gross receipts, and of the net receipts (if any) as prescribed by this Act, in respect of the tramway in each half-year, and also any other matters which it may appear necessary to them to inquire into and determine upon in order to ascertain the amount which may be applicable out of the receipts of the undertaking to the payment of the guaranteed dividend, and the amount (if any) which the guaranteeing baronies are liable to contribute towards such dividend, or towards the expenses of maintaining or working the undertaking, and the amount (if any) payable to the treasurer of the county under this Act: and shall thereupon apportion and determine the amount of such half-yearly sums (if any) to be paid by the baronies liable to pay the same, or by the Company; and the arbitrators shall set forth the several matters so determined by them in certificates under their hands, or, in case they do not agree, under the hands of any two of them, and such certificates shall be in all respects binding on the Grand Jury, the baronies and the Company; and, immediately after the delivery of such certificates to the Secretary of the Grand Jury of the county, the baronies, or the Company, as the case may be, shall be liable as herein provided for the payment of such sums as shall be specified in such certificates, and a copy of every such certificate shall be delivered to the Company, and the Company shall immediately thereon pay to such arbitrators their costs and expenses, and such remuneration for their trouble in regard thereto as the Board of Trade shall order."

The line was opened for traffic about the 1st May, 1894, and

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before the 1st of November, 1894, the Board of Trade appointed the arbitrators, Colonel O'Hara, Mr. R. Powell, and Mr E. K. Dixon, county surveyor of county Mayo (south); but, being satisfied by the representatives of the Grand Jury that the line had not been fully completed in accordance with the terms of the Presentment and Order, the arbitrators gave no certificates and the Grand Jury made no presentments for the half-years ending 31st October, 1894, and 30th April, 1895.

During this period, however, the Waterford and Limerick Railway Company paid to the Extension Company the following sums:—£1122 in respect of the half-year ending 31st October, 1894; and £1326 in respect of the half-year ending 30th April, 1895.

The first certificate of the arbitrators—for the half-year ending 31st October, 1895—was made out and dated the 20th December, 1895. It was as follows:—

"Whereas, under the provisions of 'The Tramways (Ireland) Acts,' and 'The Tramways and Public Companies (Ireland) Act, 1883,' by an Order of the Lord Lieutenant of Ireland in Council, . . . (confirmed by the statute 54 Viet., cap. i), the Athenry and Tuam Extension to Claremorris Railway Company, Limited, herein called the Company, were authorized to construct a light railway connecting Claremorris, in the county of Mayo, with Tuam, in the county of Galway . . . and by said Order the Presentment of the Grand Jury of the county of Mayo . . . was confirmed so far as related to the charge to be defrayed in perpetuity by the baronies constituting the entire county of Mayo for the payment of dividends at the rate of 4 per cent. per annum upon £98,000, the guaranteed paid-up capital of the undertaking as limited by said Order, and so far as it related to the liability of the same baronies to provide for the completing, working, and maintaining of the undertaking: And it was thereby provided that such dividends should be payable half-yearly on every 1st day of May and 1st day of November:

"And, whereas, by the Tramways and Public Companies (Ireland) Act, 1883, it is provided that the Board of Trade should from time to time during the continuance of the guarantee appoint arbitrators for the purpose of ascertaining and determining the amount in each half-year payable by virtue of said guarantee in respect of the undertaking, and that the certificate of such arbitrators should be laid before the said Grand Jury, and that the sum therein mentioned should be presented for and raised and paid over to the Company to be applied in the manner provided by the said Act:

"And whereas the Board of Trade have duly appointed us, . . . to act as the arbitrators for the purposes of said Act:

"And whereas the Company has duly delivered to us an account for the half-year ending the 31st day of October last, showing the amount of the paid-up capital of the undertaking, together with accounts of the gross receipts, expenses of the management, working, and proper maintenance, and net receipts of the undertaking.

"Now, we, the said arbitrators, having duly taken into consideration the several matters required by the Tramways and Public Companies (Ireland) Act, 1883, and the said recited Order, do by this our certificate in writing ascertain and determine as follows:—

	£ s. d.
(1.) The paid-up capital for the said undertaking to which the guarantee applies is the sum of £98,000, and the dividend thereon at the guaranteed rate of 4 per cent. per annum amounted for the half-year ending the 31st day of October, 1895, to the sum of	1960 0 0
(2.) The gross receipts of the undertaking for the half-year ending on the said last-mentioned day amounted to the sum of £1330 12 6	
(3.) The expenditure thereof amounted to the sum of £1144 11 8	
(4.) The net receipts of the undertaking applicable to the payment of dividends at the guaranteed rate on the paid-up capital of the Company amounted to the sum of . . .	186 0 10
showing a partial insufficiency in such net receipts for payment of dividends of	1773 19 2

(5) The sum of £1773 19*s.* 2*d.* sterling, being the amount of such partial insufficiency, is payable, and to be contributed towards the guaranteed dividend on the paid-up capital of the undertaking, under the presentment confirmed by the said Order, by the baronies constituting the entire county of Mayo rateably according to their respective valuations.

Witness our hands this 20th day of December, 1895.

J. O'HARA, Lieut.-Col.,
ROBERT POWELL,
E. K. DIXON,
} Arbitrators.

"*To* The Secretary of the Grand Jury
of the county of Mayo."

Pursuant to this certificate, the Grand Jury of the County Mayo at the Spring Assizes, 1896, made the following presentment:—

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TRAMWAYS AND LIGHT RAILWAYS ACT AND ORDER IN COUNCIL.

Pursuant to 46 & 47 *Vict. c.* 43.

By the Grand Jury of the County of Mayo at Spring Assizes, 1896, assembled.

COUNTY OF MAYO *to wit.* } We present that the sum of £1773 19*s.* 2*d.* be raised off the county at large and paid to our Treasurer, and by him to the Directors of the Athenry and Tuam Extension to Claremorris Railway Company, to enable said Company to pay the dividend due half-year ending 31st October, 1895, on the shares of £98,000 at £4 per cent. per annum, to be levied off the guaranteeing area—viz. the entire county of Mayo.

Total amount of dividend, £1773 19*s.* 2*d.*

J. T. BROWNE,
Foreman.

£1773 19*s.* 2*d.*

The amount was accordingly levied, and was paid, at the Summer Assizes, 1896, to the Extension Company. This presentment was not objected to, and was formally fiated by the Judge of Assize.

It was admitted that the undertaking was, during the half year in question, and since had continued to be, maintained in working order, and carried traffic.

The Grand Jury, on the 18th September, 1896, applied to the Board of Works, to pay to the treasurer of the county one-half of the £1773 19*s.* 2*d.*, so presented and levied. The Board of Works, however (after an investigation by the Treasury of the accounts), declined to do so on the ground that the expenditure included expenditure for the two previous half years, but offered to render a moiety of what they pointed out to be the correct amount.

On the 17th June, 1897, the suppliants, A. B. Kelly, as a ratepayer of the county and as solicitor to the Grand Jury, and V. J. Blake as secretary, presented a Petition of Right to Her Majesty, praying that, inasmuch as the said certificate had been made by the arbitrators, and the amount thereunder had been duly and *bonâ fide* presented by the Grand Jury, and levied in conformity with the provisions of 54 Vict. c. i., the Treasury ought to authorize repayment of one moiety of the sum of £1773 19*s.* 2*d.* to the treasurer of the county in ease of the ratepayers from whom the dividend had been levied.

In answer to the petition, the Attorney-General pleaded in substance—(*a*) that the alleged certificate was not binding on

the Crown; and (*b*) that it was bad on the following grounds:— (i) that it did not set out that the expenditure thereby certified was expenditure made during the half year ending the 31st Oct., 1895; and (ii) that it did not set out that the net receipts thereby certified were net receipts for that half year. In support of this it was averred (as was in fact the case, and was admitted) that the sum of £1144 11*s.* 8*d.*, expenditure mentioned in the certificate, comprised expenditure to the amount of £819 13*s.* 9*d.*, which was made at or was applicable to a period before the "guaranteed dividend" commenced to accrue: in other words, that the said sum of £1144 11*s.* 8*d.* comprised expenditure to the amount of £819 13*s.* 9*d.*, which was made before the commencement of the half year ending the 31st October, 1895, or was applicable to a period anterior to the commencement of that half year. It was further submitted that even if said sum of £819 13*s.* 9*d.* was properly included in the certificate, there were large receipts from the undertaking, also prior to the commencement of the half year in question, for which credit should have been, but was not, given by the arbitrators as against such antecedent expenditure, and further, that the Grand Jury were not bound to present for the full amount of the certificate. Finally, it was pleaded that the Treasury had authorized the payment of a moiety of the sum of £954 5*s.* 5*d.* (the difference between £1773 19*s.* 2*d.* and £819 13*s.* 9*d.*), the sum which should have been found by the arbitrators' certificate.

The Petition of Right came on for trial before Mr. Justice Boyd in Hilary Sittings, 1897, without a jury. The facts were not in dispute, and the result of the Treasury investigation was apparently accepted by the suppliants, as showing that, of the £1144 11*s.* 8*d.* expenditure, £324 17*s.* 11*d.* only was attributable to the half-year ending 31st October, 1895, the balance (£819 13*s.* 9*d.*) being in respect of the antecedent twelve months.

Apart from the fact that the County Surveyor was one of the arbitrators, the representatives of the Grand Jury were unaware until November, 1896, of the error in the certificate. Colonel O'Hara, one of the arbitrators, was examined (subject to objection), and stated that the vouchers (which were submitted to them so far as they could be) showed that the expenditure included that for two previous half-years; that the arbitrators included these

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in their award, and that they did this in perfect good faith, as they believed they should allow the expenses.

Mr. Justice Boyd, without expressing any opinion on the points raised, gave judgment for the suppliants, on the ground that the Grand Jury, in good faith, and without knowledge of any defect in the award, had duly made their presentment, and levied the money and paid it in pursuance of the award; and that, as the award had not been set aside or varied, they considered they were bound to act on it. His Lordship reserved all questions for the consideration of the Court.

On the 18th January, 1898, the Attorney-General obtained an absolute order, *ex parte*, for a writ of *certiorari* to remove into the Queen's Bench Division, for the consideration of the Court, the presentment of the Grand Jury and the arbitrators' certificate. This order was obtained on affidavit, setting out the circumstances to the same effect as disclosed above.

On the 1st June, 1898, *Fitzgerald* obtained an order that the matter be entered for argument upon an order to show cause why the presentment and certificate should not be quashed.

The Attorney-General (*The Right Hon. J. Atkinson, Q.C.*), and *Vesey Fitzgerald* (*Ronan, Q.C.*, and *Bushe, Q.C.*, with them), for the Crown:—

The error of the arbitrators is admitted. They included in their certificate expenditure prior to the half year (April to October, 1895) with which alone they had jurisdiction to deal—Tramways (Ireland) Act, 1883—and in doing so dealt with matters antecedent to the commencement of the guarantee, the point at which alone their powers could arise (see Tramways Act, 1883, sect. 4). Their error was double, for not only did they include antecedent expenses, but (while so doing) they excluded antecedent receipts. Their calculations and the result were, therefore, wholly incorrect in fact. Their function was limited to dealing with the expenses and receipts of the particular half-year (Tramways Act, 1883, sect. 6), and, in transgressing this limit, they exceeded jurisdiction. Further, the certificate does not state that the guarantee had in fact commenced to run, nor when it commenced. It is ambiguous, for it does not set out to what period the "amounts"

are to be referred; and the phrase "the expenditure thereof" is open to the same observation, or else is not in accordance with the facts. *The Attorney-General* v. *Barrett* (1), *Re Ardfert Presentment* (2), and *Re Penny* (3), show that on *certiorari* evidence may be given, in such a case as the present, to prove want or excess of jurisdiction: see also *Buccleugh* v. *Metropolitan Board of Works* (4).

The case of *Reg.* (*West Clare Railway Co.*) v. *County Clare Grand Jury* (5) is distinguishable, for there the error was a perhaps unauthorized expenditure *within* the half year, and the decision of the Divisional Court and of the Court of Appeal was based on the view that the error was an error within jurisdiction: see also *Reg.* (*Blessington Steam Tramway Co.*) v. *County Dublin Grand Jury* (6), and the judgment of Fitz Gibbon, L.J., at p. 673.

If the certificate was a nullity, the Grand Jury could not be "required" to present the amount certified for, nor could it be "in all respects *binding*" on them: sects. 6 and 7 of the Tramways Act, 1883. The presentment, therefore, must fall if the certificate falls. Further, the presentment is bad, in that it does not state that the line was completed and open for traffic, nor refer to the section of the Act in pursuance of which it was made, nor to the certificate on which it was based.

The fiat of the Judge of Assize (where the presentment was not questioned) could not give it any greater validity than it possessed of itself. The fact that the Court of Assize is a Superior Court—see *Doherty's Presentment* (7), The Judicature (Ireland) Act, 1877, sect. 32, and *Howard* v. *Gossett* (8) and *Re Fernandez* (9)—both cases of committal—does not alter the case. There is a wide difference between a Court exercising its inherent jurisdiction as a Superior Court, and acting merely as a confirming authority of what some inferior tribunal has done. For example, the Shannon by-laws require to be confirmed by two Judges of the High Court; but such confirmation could not, we submit, make valid a by-law that was *ultra vires*.

(1) Ir. R. 3 Eq. 392.
(2) Ir. R. 3 C. L. 16.
(3) 7 Ell. & Bl. 360.
(4) L. R. 3 Ex. 306; L. R. 5 H. L. 418.
(5) [1894] 2 Ir. R. 691.
(6) 32 L. R. Ir. 644.
(7) [1895] 2 Ir. R. 498.
(8) 10 Q. B. 359.
(9) 10 C. B. (N. S.) 3.

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The certificate and presentment should therefore, we submit, be quashed, and the judgment in the Petition of Right reduced to the admittedly correct amount (1).

The Right Hon. The Mac Dermot, Q.C., and *Fetherstonhaugh* (*O'Connor, Q.C.*, with them), for the suppliants (respondents in the *certiorari*) :—

The arbitrators' certificate was final and conclusive, and was binding on the Grand Jury. It was made in good faith. It is regular on its face, and evidence cannot be admitted on *certiorari*—and was wrongfully admitted on the trial of the Petition—to question its validity: see *The Blessington Tramway Case* (2), and *The West Clare Railway Co. Case* (3). The Grand Jury acted upon it honestly. The moment the award was made their liability to pay arose. The Tramways Act, 1883, requires them (section 7) to present the sum certified for, and if they failed to present "the sum or any part thereof," and even if the Judge were to refuse to fiat the presentment, the Treasurer would nevertheless be bound to include the amount in the levy-warrant. The presentment, on receiving the fiat of the Judge became the judgment of a Superior Court—*Re Doherty's Presentment* (4)—and cannot be questioned. The amount has been levied and paid away. Equally both the Grand Jury and the Treasury have been wronged, and the loss should have been borne equally by both.

Vesey Fitzgerald in reply.

Cur. adv. vult.

June 15.

Andrews J. :—

These cases came before us on the 3rd of June instant, to be heard together in accordance with an order made on the 10th of May last that they should be so heard.

The case of the Attorney-General and the Grand Jury of the county Mayo came on for argument, pursuant to an order of the 1st of June instant, in which the 3rd of June was given to the parties interested to show cause why the Grand Jury presentment and arbitrators' certificate should not be quashed; and the case of

(1) For convenience the argument in reply has been embodied in the above summary.

(2) 32 L. R. Ir. 644.

(3) [1894] 2 Ir. R. 691.

(4) [1895] 2 Ir. R. 498.

Kelly and another, Suppliants; The Queen, Respondent, came on for argument upon a notice of motion on behalf of the Crown to set aside the judgment for the suppliants for £886 19*s.* 7*d.* with costs, and to enter judgment for them for £477 2*s.* 8*d.* with costs.

The cases were accordingly heard together, and the whole of the evidence in both of them was opened and discussed. I therefore feel at liberty to refer to the whole of the evidence in dealing with each case.

The question, by the determination of which each case will be decided, is whether the presentment by the Grand Jury of the 17th March, 1896, must be held by this Court to be a valid presentment which cannot now be quashed or impeached.

In my opinion, when considering this question, we are not only at liberty but bound to refer to the arbitrators' certificate of the 20th of December, 1895, which, though not referred to in the presentment, is an essential part of the proceedings which gave the Grand Jury the power to make it: see the case of the *Ardfert Presentment* (1).

Turning then to this certificate, I find that it states that the Company had delivered to the arbitrators an account for the half-year ending the 31st of October, 1895, showing the amount of the paid-up capital of this undertaking, *together with accounts of the gross receipts, expenses of the management, working, and proper maintenance, and net receipts of the undertaking.* The jurisdiction of the arbitrators was limited to dealing with the receipts and expenditure of that half-year in order to ascertain the net receipts of that half year, upon which the amount of the guarantee would depend.

Colonel O'Hara, one of the arbitrators, was examined on the hearing of the Petition of Right; and his evidence was received subject to objection. In my opinion, it was clearly admissible to show what matters the arbitrators took into consideration for the purpose of making their award, so as to enable it to be ascertained whether any of these matters were outside the scope of the award, and therefore outside the jurisdiction of the arbitrators to entertain; *Duke of Buccleuch* v. *Metropolitan Board of Works* (2).

In his evidence, Colonel O'Hara said, "I was one of the arbi-

(1) Ir. R. 3 C. L. 31, 33. (2) L. R. 5 H. L. 418; see pp. 433, 457, 462.

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trators; book of accounts was furnished by the Company to the arbitrators (produced) on the 18th December, 1895; the secretary of the Company alone was before us"; and further on in his evidence he said—" the vouchers were submitted to us, as far as they could, and we examined them; the vouchers show that the expenditure included that of two previous half-years; we included these in our award."

The tenth paragraph of the joint affidavit of Henry Williams and Octavius Henry Braddell, filed on the 18th of January last, on which the order for the *certiorari* was made, refers to books of the Company which had been produced for the inspection of the deponents, together with the receipts, cheques, and other documents in the Company's possession; and, having regard to the reasons for which they were produced, and to the result of the examination of them, I feel at liberty to infer that these were included in the documents which had been produced to the arbitrators. The deponents go on to say that they found, from an examination of these documents, that various items of expenditure, which had either been paid by the Company, or allocated by them to the expenditure of previous half years, had been charged by the Company, before the arbitrators, to the half-year ending the 31st October, 1895, and had been included by the arbitrators in their certificate, as expenditure made during that half-year. This is not denied.

Now, just as, in my opinion, when considering the validity of the presentment, we are at liberty to refer to the arbitrators' certificate, even although not expressly referred to in the presentment, so, in my opinion, are we at liberty, when considering the validity of the certificate, to refer to the accounts which were essential to give the arbitrators power to make the certificate, and which moreover *are* referred to in the certificate. If I am right in this, the certificate is thereby shown to be invalid, as having been made in excess of and without jurisdiction; and is a certificate which this Court ought to quash. And it follows, in my opinion, that the presentment must fall with the certificate which is its foundation. If (as I agree) when we are considering the validity of the presentment, we should refer to the certificate, even though not mentioned in the presentment—and if, when considering the validity of the

certificate, we are at liberty, as in my opinion we are, to refer to the accounts and documents on which the certificate is founded, and which are mentioned in it—and when we find, from the undisputed evidence before us, that an examination of those accounts and documents shows that the certificate is invalid, and ought to be quashed—we cannot, in my opinion, stop short at the certificate, and refuse to quash the presentment of which it is the foundation.

I am also of opinion that the arbitrators cannot exclude this Court from referring to the accounts mentioned in the certificate, and on which it is founded, by adopting, in framing their certificate, ambiguous words taken from the 9th clause of the Order in Council confirmed by the Special Act of 1891 (54 Vict. c. i.); and, although the presentment was fiated at the Assizes, once we are at liberty to refer to the proceedings essential to its validity, and find the foundation of the presentment invalid, we are, in my opinion, bound to deal with the presentment as bad on its face, and to quash it. To do otherwise would, in my opinion, involve the anomaly of refusing, on technical grounds, to quash proceedings which have been proved to be without jurisdiction by undisputed evidence which we have listened to, and which, in my opinion, we have been bound to hear and consider.

When the presentment came before the Judge of Assize, his fiat passed in reality like a judgment by default. No judicial decision was in fact given thereby. Supposing, however, the Judge's attention had been drawn to the facts, will it be contended that, knowing what we now know, he ought to have fiated the presentment? I think he neither would nor ought to have done so; and, if he could have refused his fiat to the presentment, is this Court to say that it is now unable to quash it?

I think it would be seriously curtailing the jurisdiction of the Queen's Bench to hold that, in such a case as this, it cannot interfere with the presentment in question, especially at the instance of the Crown. The fact that the money presented has been levied and paid, is not, in my opinion, an insuperable obstacle to right being done in either of the cases before us. Those who have received an amount in excess of what they had a right to receive,

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may, as it appears to me, be justly held bound to give credit for such excess against future payments under the guarantee, even if (which I do not decide) they cannot be required to refund it.

There are two other objections to the presentment in question which are of a technical character, and which I do not base my judgment upon; but I am not therefore to be taken as giving a decision against them. One is that the section of the Act is not referred to in the presentment; and the other—a more important one—is that it does not appear either by the presentment or by the certificate, that the line had been fully completed so as to bring the guarantee into operation.

I do not think my judgment in this case is at all at variance with the decision in *Reg.* (*West Clare Railway Co.*) v. *Grand Jury of County Clare* (1), as the expenses in question in that case were incurred during the currency of the guarantee, and the arbitrators had jurisdiction to decide upon them. In the present case charges and expenses, plainly and admittedly incurred before the guarantee took effect, have without jurisdiction been illegally allowed by the arbitrators against the receipts for the half-year after the guarantee began, without even giving credit for the admitted receipts during the period within which those charges and expenses were incurred—a proceeding which, if not conclusively proved, would scarcely be credible.

In my opinion the certificate and presentment should be quashed, and, the Crown so consenting, the judgment in the Petition of Right should be reduced to the amount for which, it has not been disputed, the presentment ought to have been made, viz. £477 2*s.* 8*d.* The parties respectively must abide their own costs.

O'Brien, J.:—

The Tramways Order in Council Confirmation Act of 1891, relating to the Athenry and Tuam Extension to Claremorris Railway, directs that the Board of Trade, on or before the 1st May or 1st November, whichever shall occur first after the opening of

(1) [1894] 2 Ir. R. 691, p. 718.

the railway for traffic, shall appoint the arbitrators provided for by the 6th section of the Tramways Act, 1883, and the promoters shall, on or before the 20th June and the 20th September in every year, make out and deliver to the arbitrators an account for the then preceding half-year ending on the 30th April or 31st October, showing the amount of the paid-up capital of the undertaking, and a further account of all the receipts of every nature and kind for the then preceding half-year ending on the said 30th April or 31st October, arising in any manner from the undertaking, and the expenditure thereof; and the said arbitrators shall deliver their certificate in writing to the Secretary of the Grand Jury of the said county before the 1st June and the 1st December in each year, ascertaining and determining the amount in each half-year payable by the baronies in respect of the undertaking; and the said certificate shall be laid by the said Secretary before the Grand Jury of the said county at the Assizes next after he shall have received the same; and the sum mentioned in said certificate shall be presented for and raised and paid to the promoters, and applied by them in the manner provided by the 7th section of the said Act in respect of the certificate therein mentioned—that is, the amount of the June certificate is to be presented at the Summer Assizes, and the December certificate at the Spring Assizes of the year following.

Now, in considering what is the jurisdiction of the arbitrators, we start with the point that the materials on which they are to base their calculations are cut off expressly at the beginning and the end of the half-year, that they have no other accounts and cannot look at any others, that they are in the same position as if they were led blindfold into a place, and not let see how they came or how they were to leave. We have, therefore, a peremptory initial boundary laid down for them, at the very first step, in the thing they are to examine into. And I suppose whatever other question concerns the errors of arbitrators, it will not be contended, as to any kind of arbitrator, either as to a private arbitrator, still less as to an official arbitrator, acting under the direct command of a statute, that the subject of reference is not the primary measure of the authority that the arbitrator possesses, that that is the landmark which it would be a simple contradiction by any form of language to displace, that, to use the terms

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acquiesced in by counsel, arbitrators may err within their jurisdiction, but cannot err beyond it. The directions contained in the Order, which is the authority that lays down what the arbitrators are to do, and is not identical with the terms of the Act of 1883, give a further opening to material criticism in reference to what was done. For while it is the amount of the paid-up capital, and the amount payable under the presentment, that they are to state, they are to give a further account of all the receipts of every nature and kind for the then preceding half-year arising in any manner from the undertaking, and the expenditure thereof, which if it had been complied with otherwise than by the statement of a single sum in gross, would have inevitably disclosed the extraordinary course that was adopted. What was that course? A most startling revelation on the subject came out on the trial of the Petition of Right. For it appeared that, at the meeting of the arbitrators in each of the two preceding half-years, Mr. Kelly, the solicitor for the Grand Jury, attended and made the objection that the line was open but not completed, and that the guarantee was not payable upon the express condition in the Order, which, as the Attorney-General stated in the argument, was insisted upon by the authorities; and, upon this objection, no certificate was given. Yet, notwithstanding this, Colonel O'Hara, one of the arbitrators, states in his evidence that, on the next occasion, when the award on which the presentment now in question was founded was made, the vouchers that were produced before the arbitrators showed that the expenditure included that for the two previous half-years, that the arbitrators included them in the certificate, and that they did this in good faith, for the reason expressed by him, "as they believed they should allow the expenses." To add to the simplicity of official faith, nothing more was required than that they should omit altogether the receipts for the same period, which were the rent paid by the Waterford and Limerick line of £51 a-week for twelve months, although they could not but know that the receipts were to be credited against the guarantee for the period for which the expenses were to be allowed. The effect of this is that the Company are to keep all the profits, and the ratepayers and the Crown to bear all the expenses for the preceding year.

I suppose it would occur to anyone not immersed in legal obstacles that there is some solution in the way of remedy for such an extraordinary business; and he would be slow to accept, except in the last necessity, a confession of impotence, that the law could give no account of a patent wrong. I do not think the law is so impotent at all, or that by applications of the rules in *certiorari*, which go beyond anything that has been yet heard of, and by carrying the consequences of these rules into the Petition of Right, the law can be locked up into a dilemma, out of which there is no way except into manifest and declared injustice. The way out of it, the plain sense and law of the matter, is that the Act commits to the arbitrators a specific measure of time concerning which they are to inquire, and that they have no jurisdiction beyond it. What is the meaning of jurisdiction? The office of arbitrator cannot be it. The subject of inquiry is the jurisdiction in all kinds of authority. Arbitrators under the Board of Trade have no different function from that of other arbitrators. The subject of reference in all cases determines the jurisdiction. The subject of reference in this case is what is brought within a half year, the date of which is specified, whether matter of account, or charge, or credit, or inquiry. The receipts are of the half-year preceding the 30th of April or 31st of October. "The expenditure thereof" in the same sentence—under which, if the certificate did not conceal the facts, the beautiful result comes out, that all the receipts of the railway went in expenses, except a mere fraction—must be the expenditure of the half year; for the Order could not mean that receipts were expended before they were received. If the arbitrators did not exceed their jurisdiction, or more properly usurp jurisdiction, in taking in a whole year before, why not go back further or take in any antecedent time, or do any other extravagant act? I should like to see a case where a statute commanding a particular act to be done by an inferior authority constituted for that express object, and directing their functions by a statement of time, where it was held even on *certiorari* that an act when contrary to the statute was valid, unless the defect appeared on the face of it. The case of *The Queen* v. *The Grand Jury of the County of Dublin* (1), in the Court of Appeal,

(1) 32 L. R. Ir. 644.

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is no authority for such a proposition, for that case was decided on the ground that the liability strictly fell within the half-years, for it was the case of costs which ran over into the half-year, and which could not be severed, or recovered, until the work was at an end. In like manner, the *West Clare Railway Case* (1), also in the Court of Appeal, was no decision on the point, for that was a question of capital or revenue, not of the time to which it was considered the judgment of the arbitrators did properly apply; and the decision was most carefully and expressly guarded by Lord Justice Walker in terms that could not admit of its being extended to the present question. Though the case was wholly different, the Court drew back from a view of the dangerous lengths to which an unqualified application of the principles relied on would lead them.

The present case is not different in degree, but in the principle altogether. Even if the law of *certiorari* contained no germ of expansion to meet the needs of justice, but of contraction to a refinement before unknown, we have to reckon here also with the judgment on the Petition of Right, which depends on grounds of law and not merely of procedure. Now, even upon *certiorari*, if it be necessary to remove the obstacle of the actual presentment out of the way, it never was denied that, where there was excess of jurisdiction, though the proceeding was regular on the face of it, this could be shown by affidavit. This was laid down in the *Ardfert Presentment Case* (2), though it was not necessary to act upon it, because there was a defect on the face of the presentment at the Sessions; and this was also stated by Hayes, J., in *Re Co. Mayo Presentments* (3). But, as a case that touches more closely the present one, and an authority far more absolute than is required to govern it, I refer to *Re Penny* (4), where the rule was explicitly stated, and it was allowed on *certiorari* to be shown by affidavit that a jury under the Lands Clauses Act had taken into consideration in the amount of compensation an item of damage that the law did not admit, and that for that reason the proceeding was wholly void. This certainly is a far stronger example than that of arbitrators travelling out of the time which is assigned as the express measure of their duty.

(1) [1894] 2 Ir. R. 691.
(2) Ir. R. 3 C. L. 16.
(3) 14 Ir. C. L. R. 392.
(4) 7 E. & B. 660.

However, it may be conceded that this is not questioned, but that a further effect must be given to the clause in the Act of 1883, which says that the certificates shall be in all respects binding on the Grand Jury, the baronies, and the Company; that, immediately after the delivery of the certificates, the baronies shall be liable to the payment of the amount; that the Grand Jury are required to present same at the Assizes; and, that in default of their doing so, the treasurer shall insert the same in his warrant, as if the presentment had been made. These proceedings, however, as in the case of words not less coercive, which have been held nevertheless not to take away *certiorari*, are based upon the existence of jurisdiction, and are not inconsistent with the right of the Grand Jury to question the certificates on that ground, or to object to the treasurer including them himself, or to recover back the money if paid to the Company. And, as I understand the argument, it is by reason of those provisions, it is contended, that defect of jurisdiction has no operation on the presentment, as it would have if the defect appeared on the face of it, that is, in other words, that the imputation of validity by the statute could not cure a defect in the presentment itself, but could in the jurisdiction. Even if the proceedings consequent on the certificate were such as to exclude any interval for objecting to a presentment, which is not the case, or to the treasurer inserting it in his warrant, and the Grand Jury were compelled to make an illegal presentment, that would not prevent any other person from questioning it afterwards. Such an assumption, however inconvenient, is less extreme then that the Legislature intended a presentment to be made that was undeniably bad.

But now let us see the next stage to which we have to proceed, and whether the Crown has anything to say to the question of a payment palpably illegal. The Act says, the certificate shall be binding on the Company, the Grand Jury, and the baronies; it says nothing of the Crown. Can the Crown, by reason that the Grand Jury has made a presentment in fact, be required to make a contribution that is wholly illegal; or must it be involved in the error of the arbitrators, without any remedy? Let us observe the succession of difficulties on which this result depends. First, the certificate is

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untrue, but it is conclusive. Next, the presentment is wrong, but it is imperative. The error is crystallized, as it were, at that point. And because that error is committed, it must become the foundation of another error, by which the Crown, whose obligations, in the interests of the public, are defined by law, is called upon to pay what most certainly is not according to the engagement they have entered into. The Treasury, the Order provides, shall authorize the Board of Works, out of moneys provided by Parliament, to pay to the treasurer of the county one half the guarantee for such half-year. I do not undertake to say what, in a Petition of Right, is the effect of this clause, whether it is an absolute engagement that justifies a judgment directly against the Crown, or whether the reference to the fund, the moneys provided by Parliament, makes it discretionary or dependent upon consent, or reserves to the Crown an appeal from the impotence of law to power, in order to prevent a plain violation of right, the misappropriation of public funds. But I cannot understand how any argument upon the effect of the certificate or the fact of the presentment, can take away the right of the Crown, in the proceeding for a *certiorari*, or on the Petition of Right, to insist that the obligation is founded upon a strictly legal and valid presentment, and that in fact they have no right to apply the funds of the State in any other event. They may leave the presentment as it stands, and may resist the Petition of Right merely, and say the engagement does not pass to them, or they may, in the interest of the baronies, take up the error at the beginning, by means of the *certiorari*, and contend that all the proceedings are void for want of jurisdiction, and that the Company have no right to retain money to which it is most obvious they never could suppose they were entitled.

This is not at all the case that sometimes occurs where a mistake, otherwise irremediable, takes place, and the burthen must be placed somewhere upon an innocent party.

There is still another argument, on which it was contended that the presentment could not be questioned, namely, that it was fiated by the Judge, and that this had the effect of making it a judgment of a Superior Court, which could not be questioned. This view certainly comes upon me by surprise,

for I know of no case in which the quality of a judgment with such a consequence was attributed to the perfunctory and nearly formal assent of the Judge at Assizes to a presentment, which is the action of another body. The *Ardfert Presentment Case* (1) is a direct authority to the contrary, for it is expressly stated that the presentment, which was held to be illegal, was fiated by the Judge; and further, it is an authority on the other branch of the question, for it was admitted to be valid on the face of it, and the illegality was shown by affidavit. In that case it was not suggested in the argument that the fiat was an obstacle to the interference of the Court; and in fact all the cases which have come into Court of motions to quash presentments must have been in the same position.

For these reasons I am of opinion that both branches of the application of the learned Attorney-General ought to be granted, and that a writ of *certiorari* ought to be issued to quash the presentment, and judgment entered for the Crown on the Petition of Right, in order that full and complete justice should be done throughout, to the Crown, and to the ratepayers. And I consider it a signal instance for the intervention of the Court, in order that what was a direct and studied condition in the Order, for the protection of the public against the evasion of private interest, should not be found to be capable of being baffled by barefaced illegality.

PALLES, C.B.:—

I am unable to adopt the views of my learned colleagues, or to arrive at the conclusion which they have reached.

I am of opinion that the judgment for the suppliants entered by Mr. Justice Boyd at the trial should stand, and that we should refuse to quash the presentment which has been brought up on *certiorari*.

The original presentment—made at the Summer Assizes of 1890—and confirmed by the Order of the Lord Lieutenant in Council on the 29th November, 1890, and the statute 54 Vict. c. i, imposed two different classes of liability upon the specified baronies,

(1) Ir. R. 3 C. L. 16.

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viz. first, liability in respect of dividend; and, secondly, liability from default by the Company in completing, working, or maintaining the undertaking.

The first class of liability is the subject-matter of clause 2 of the original presentment, and of sect. 4 of the Act of 1883, 46 & 47 Vict. c. 43. That clause of the presentment is as follows:—"A dividend at the rate of 4 per cent. per annum is hereby guaranteed, and shall be paid half-yearly, in perpetuity, by the baronies constituting the entire county of Mayo, . . . all of which collectively are hereinafter called the 'guaranteeing area,' upon the share capital of the Company, for the time being paid-up capital, as defined by the Tramways and Public Companies (Ireland) Act, 1883, provided that the entire amount of such guaranteed capital shall not exceed the sum of £98,000, and that the Government subvention of 2 per cent. shall apply to the whole of said guaranteed capital."

Section 4 of the Act of 1883, 46 & 47 Vict. c. 43, enacts that, during the continuance of such a guarantee, "the net receipts from the tramway, after deducting from the gross receipts the expenses of the management and working, and proper maintenance of the tramway, shall be applied to the payment of the dividend at the guaranteed rate on so much of the share capital of the Company applicable to such tramway as is for the time being paid-up capital within the meaning of this Act; and, in the event of the total failure or partial insufficiency in any half-year of such net receipts to pay such dividend, then the sums required to pay such dividend, or to make up any deficiency therein shall be charged upon and levied off the barony or baronies chargeable under the guarantee, and the sums so levied shall be applied for that purpose, and to no other purpose whatever."

The second class of liability, viz. that in reference to the completing, working, and maintaining of the undertaking, is the subject-matter of clause 5 of the presentment, and of sect. 10 of the Act of 1883. That 5th clause of the presentment provides: "If at any time default shall be made by said Company in completing, working, and maintaining such undertaking, the said 'guaranteeing area' shall contribute such sum or sums of money as may be necessary for such completion, working, and maintenance."

Section 10 of the Act of 1883 enacts that every Order in Council which confirms the presentment of a Grand Jury for a baronial guarantee shall provide all such provisions as may be necessary for securing that the tramway shall be completed, and shall be maintained in good order and condition, and shall be efficiently worked by the Company or their assigns; and that, if default is made in such completing, or if at any time the receipts from the undertaking are insufficient to defray the expenses of management, and of efficiently maintaining and working the undertaking, then such sums as may be necessary for these purposes shall be contributed from time to time by the guaranteeing baronies.

Accordingly, section 40 of the Order contains provisions for securing the completion and maintenance of the undertaking, and section 6 confirms the presentment "so far as it relates to the liability of the same baronies to provide for the completion, working, and maintaining of the undertaking."

I deem it important (in consequence of an observation of one of my learned colleagues) to point out that the liability sought to be enforced against the Crown in the present proceeding is admittedly a liability of the first class, viz. one in respect of dividend.

There is no evidence, nor even suggestion, that default was made by the Company in completing, working, or maintaining the undertaking; and it is expressly admitted in the answer and plea of the Attorney-General, that the undertaking was, during the half-year ending 31st October, 1895, and still is, maintained in working order, and carried traffic.

The latter class of liability, viz. that in reference to completing, working, and maintaining the undertaking, I mention only for the purpose of putting it out of consideration, and thereby excluding the application of certain words in the section which creates the liability of the Crown—words to which an effect has been given in the judgment of one of my learned colleagues which in my opinion cannot be maintained. That section is No. 14 of the Order, and every word of it is material:—"When in any half-year after the opening for traffic of the said light railways the said baronies have paid to the Company any sums in respect of guaranteed dividend, exclusive of any sum paid in respect of the

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completing, working, or maintaining of the undertaking, the Treasury shall, if and so long as the railway is maintained in working order and carries traffic, authorize the Board of Works, out of moneys provided by Parliament, to pay to the treasurer of the county, to be put to the account of the said baronies in the proportion of the sums paid by them, a sum amounting to one-half of the sums so paid by them in respect of guaranteed dividend, exclusive as aforesaid, during such half-year, but so, nevertheless, that the sum so authorized to be paid shall not exceed a sum equal to interest at the rate of 2 per cent. per annum on the paid-up capital, limited as aforesaid."

Thus, there are four conditions precedent to the liability of the Crown :—1, payment to the Company by the baronies; 2, that such payment is in respect of a half-year after the opening for traffic of the tramway or railway; 3, that such payment is in respect of guaranteed dividend, and not for the completing, working, or maintaining of the undertaking; 4, that, during the half-year the railway has been maintained in working order, and carries traffic. If these four conditions are satisfied, then this Order, which is confirmed by the statute, imposes a liability upon the Crown to pay to the treasurer of the county half the sums "so paid as guaranteed dividend, but so that the same shall not exceed 2 per cent. per annum on the paid-up capital, limited as aforesaid," *i.e.* to £98,000.

Now, it has been proved :—1, that a payment of £1773 19*s.* 2*d.* has in fact been made to the Company by the baronies; 2, that that payment was in respect of guaranteed dividend, and not for the completion, working, or maintenance of the undertaking; and 3, that during the half-year ending the 31st October, 1895, the railway was maintained in working order, and carried traffic. The sum sought to be recovered, viz. £886 19*s.* 7*d.*, is half the sum so paid as guaranteed dividend, and is less than £980, which would be 2 per cent. per annum for half a year on the paid-up capital of £98,000.

These admitted facts appear to me to leave open for our consideration only two questions, first, whether the payment by the baronies was one which was rightfully made by them, *i.e.* one made under a legal liability, and secondly, whether it was made

in respect of the dividend for the half-year ending upon the 31st October, 1895.

Now, if the presentment of spring, 1896, is valid and binding, it concludes both these questions—the first, because its effect under the 7th section of the Act of 1883, is to legally charge the amount in question upon the baronies, and to leave the cesspayers without answer to a distress for the rate directed to be levied for its payment; and, the second, because it adjudicates that the sum directed to be raised is the partial insufficiency in respect of guaranteed dividend for the half-year in question.

Again, even if the presentment be not valid, still, as under that 7th section the treasurer is bound, if the Grand Jury fail to present the sum contained in the certificate, to himself insert that sum in his warrant, *as if* it had been *duly* presented—and, as it was so included in, and was levied under, the warrant, then, even in that event, the liability of the Crown would be complete, if the document relied on as a certificate be in law a certificate within the meaning of the enactment, or, in other words, if it be good on its face.

This brings me to the two questions upon which, in my opinion, our judgment should depend—first, is the presentment valid? secondly, if not, is the certificate good on its face?

I shall first consider the validity of the presentment. The direction to make it is contained in the 7th section :—"The Grand Jury are hereby required, from time to time, and without application to Presentment Sessions, to present the sum mentioned in such certificate as payable by any barony . . . to be raised and levied in like manner as any presentment made under the authority of" 6 & 7 Wm. 4, c. 116.

This statute of William the 4th does not in terms render the *fiat* of the presiding Judge essential to the validity of a presentment; nor, indeed, does it direct that presentments shall be fiated at all; yet the frequent reference to the "*fiat*" in that and other statutes, and the settled practice, extending back to a period far earlier than that statute, of the validity of presentments being discussed before, and determined by, Judges of Assize; their constant refusals to fiat such presentments as they believed to be illegal; and their many reservations for the general body of Judges of

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questions as to the validity of presentments, satisfy me that a determination of a Grand Jury does not answer the description of a presentment of the Grand Jury at the Assizes, until it is entered upon the records of the Court of Assize; that that entry cannot be made without the direction of the presiding Judge at the Assizes; and that his direction to the officer of the Court to record a particular presentment is that which answers the popular expression of the Judge's "*fiat*" of the presentment. The Judge, whose direction is thus essential to the existence of a presentment of a Grand Jury at Assizes, constitutes, as since *In re Fernandez* (1) is absolutely settled, a Superior Court of Record; and, for that reason, it appears to me certain that such a presentment cannot be quashed, unless it is bad on its face. I ventured to express this opinion in *Re Doherty's Presentment* (2); but, as it has been contested by Mr. Fitzgerald in the course of his extremely able argument, I shall refer to two of the many cases in which the principle was recognised at a period before Courts of Assize were judicially determined to be Superior Courts.

In *Ex parte Henn* (3), where it was sought to quash on *certiorari* a presentment for making a new line of road, upon the ground that the presentment had been made contrary to sect. 55 of the Grand Jury Act, which provided that no such presentment should be made unless a notice of the application to make it had been served upon each occupier of the land, Crampton, J., asked during the argument—"Is there error on the face of the presentment? for if there be not, this Court cannot quash the proceeding." Lefroy, C.J., in giving judgment, says:—"Then we have the Judge's fiat of this presentment. Are we to presume, too, that he did not enquire into the necessary requirements before fiating—before he sanctioned, *by a final judgment*, all these antecedent proceedings? Are we to presume that all these tribunals have violated their duty?"

In a case entitled *In re Presentments County Mayo* (4), many presentments were impeached, and some of them were quashed, but the expressions of three of the Judges, viz. Lefroy, C. J.,

(1) 10 C. B. (N. S.) 3.
(2) [1895] 2 Ir. R. 493.
(3) 6 Ir. C. L. R. 239.
(4) 14 Ir. C. L. R. 392.

O'Brien, J., and Fitz Gerald, J., show that they were agreed upon the principle upon which I now insist. Lefroy, C.J., says:—"Another general principle is that in granting the writ in cases of this sort we cannot go behind the presentment; . . . in fact we have only to apply in the present instance to this species of cases that great principle of the common law, *Post judicium omnia præsumuntur rite fuisse acta.* When a Court of Record gives a judgment, it is presumed that every preliminary act which is necessary and essential to found that judgment has been done; and accordingly that principle is applied here to the Judge's fiat. It is a judicial act of a Court of Record having jurisdiction over the particular subject-matter." O'Brien, J., says (p. 407):—"I concur in the principle laid down and acted on in the cases of *In re Henn* (1), and *In re Quinn* (2), namely, that, in order to sustain an application for a *certiorari* in respect of a presentment, on the ground of its being illegal, the illegality should be apparent on the face of the presentment itself, and that this Court should not go behind the presentment to see whether it has been properly obtained, or whether certain preliminary proceedings directed by the statute had been taken." Fitz Gerald, J., adds:—"We are not infringing the rule which forbids us to go behind the presentments themselves."

It is true that three judicial expressions may be referred to as disaffirming, or throwing doubt upon, the principle. I refer to some words in the judgment of Crampton, J., in *Ex parte Henn* (1); to the judgment of Hayes, J., in *In re Presentments County Mayo* (3); and to some words of Whiteside, C.J., in *The Ardfert Presentment Case* (4). It will be found, however, that two of these three cases are not inconsistent with my views.

In the first of these cases—*Ex parte Henn* (1)—in which, as I have already stated, Crampton, J., expressed his opinion that the Court could not quash the presentment unless there were error on the face of it, the judgment of that learned Judge contains the following words:—"As to the general jurisdiction, the cases in England all establish the proposition, now well settled—if an

(1) 6 Ir. C. L. R. 239.
(2) 9 Ir. L. R. 160.
(3) 14 Ir. C. L. R. 392.
(4) Ir R. 3 C. L. 16; pp. 28, 30.

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inferior tribunal has general jurisdiction of a matter, whatever mistakes that tribunal makes, this Court will not hold an inquiry into them; but if they have no jurisdiction to entertain the subject-matter, then this Court will interfere on affidavits brought before it." I cannot believe that by these words Mr. Justice Crampton intended to express an opinion that the rule applicable to quashing a presentment was the same as that which applied to inferior Courts. The words he used may be accounted for by a number of cases in reference to inferior Courts having been referred to by Mr. Martley when moving the application, and to a desire of the learned Judge to show that the decision in which he took part did not question their authority. But, even if I be wrong in this, the subsequent decison of *In Re Fernandez* (1) removes the basis upon which the opinion of Mr. Justice Crampton was founded.

But further, as the jurisdiction of the Court of Assize is a statutable one, its adjudication must on its face show jurisdiction, so that, in the case which Crampton, J., puts as one justifying the interference of the Court, the presentment would be bad on its face.

In *In re Presentments County Mayo* (2), the ground of the judgment of Hayes, J., was that the statute there in question, by negative words, excluded the jurisdiction of the Grand Jury and of the Judge of Assize, in the event which had happened, of the non-publication of certain lists.

In the third case I have referred to, the *Ardfert Presentment Case* (3), Whiteside, C.J., quotes the words I have referred to from the judgment of Crampton, J., in *Ex parte Henn* (4), and proceeds: "That is the true distinction. Where the writ seeks an inquiry into any of those preliminary matters which it is peculiarly the duty of the Presentment Sessions to inquire into, the Court will not go behind the presentment; but where the inquiry is as to the jurisdiction of the Sessions to entertain the application at all, then that question is open on the affidavits. This principle is clearly established in *In re Penny*" (5).

(1) 10 C. B. (N. S.) 3.
(2) 14 Ir. C. L. R. 392.
(3) Ir. R. 3 C. L. 16; pp. 29, 30.
(4) 6 Ir. C. L. R. 239; p. 244
(5) 7 E. & B. 660.

In re Penny (1), however, was a case relating to an inferior tribunal, viz. to a jury summoned under the Railways Clauses Consolidation Act, to ascertain the amount of the deterioration in the value of property adjoining a railway, by reason of its construction. O'Brien, J., and Fitz Gerald, J., in the *Ardfert Case* (2) held that the presentment there was bad upon its face. Further, what I have said as to Mr. Justice Crampton's observations in *Ex parte Henn* (3) is alse applicable to the words of Whiteside, C.J.

Upon the whole, it appears to me that the weight of authority, before it was finally settled that a Court of Assize was a Superior Court, was in support of the principle that a Grand Jury presentment could not be impeached, save for error on its face; and that the decision that that Court was a Superior Court absolutely concludes the matter.

But I have further to observe that this question cannot arise in the present case, because here, under the 7th section of the Act of 1883, the general jurisdiction of the Judge and of the Grand Jury, over the subject-matter—their power to enter upon the inquiry as to the certificate—arose upon the document being laid by the Secretary before the Grand Jury, and was not dependent upon any preliminary proceeding having been taken at Presentment Sessions. If that document were valid on its face, that is, if it answered the description of "such certificate" in the 7th section, there was more than a power to inquire—there was more than jurisdiction to present—there was an obligation to do so; and, therefore, whichever of the two views I have mentioned as to the matters which may be taken into consideration to invalidate a fiated presentment, be the correct one, extrinsic circumstances tending to show that the certificate was invalid cannot be relied on.

It is next argued that this presentment is bad upon its face. If this is so, I would agree that the presentment was invalid because a certificate good on its face is an essential condition of the jurisdiction of the Grand Jury and the Judge; and the presentment must (according to the decision in the *Ardfert Case* (2)) be taken to incorporate it. The first objection made was ultimately abandoned by the Attorney-General. It is that the 127th section of

(1) 7 E. & B. 660. (2) Ir. R. 3 C. L. 16; pp. 29, 30.
(3) 6 Ir. C. L. R. 239; p. 244.

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the Grand Jury Act of 1836 has not been complied with, because although the year of the Sovereign's reign, and the chapter of the Act of Parliament which authorized the presentment is inserted, the number of the section is omitted. In *The County Mayo Presentments Case* (1), already referred to, non-compliance with this provision was one of the principal grounds upon which the judgments were based.

Now, had there been in the statute authorizing the presentment (2) more sections than one which authorized presentments of public money, I should have found great difficulty in declining to yield to the objection; but as this particular statute contains only one such section, I think the purpose of the 127th section of the Grand Jury Act is satisfied, in the same way as it would have been if there had been but one section in the Act, in which case I apprehend it would be clear that the reference to the Act would have included a reference to the section.

The next objection was that the certificate referred to in the presentment did not state that the line was open for public traffic during the half-year in question. No doubt there is an omission in this respect; but there is a statement that the Company had delivered to the arbitrators "accounts of the gross receipts and expenses of management, working, and proper maintenance, and net receipts of the undertaking," receipts and expenses which it seems to me could not have existed unless the line were open for public traffic; and, having regard to the principle of construction of judgments of Superior Courts laid down in *Howard* v. *Gossett* (3), and to the maxim I have already referred to—*Post judicium omnia præsumuntur rite fuisse acta*—I presume that which was necessary to give validity to the presentment, viz. that the line was open.

The most serious, however, of the objections remain. The Attorney-General, by his answer, insists that the certificate is bad, because he alleges that it does not show that the expenditure thereby certified was made during the half-year ending the 31st October, 1895; nor that the net receipts thereby certified were receipts for that half-year.

(1) 14 Ir. C. L. R. 392. (2) 46 & 47 Vict. 43. (3) 10 Q. B. 359.

The words of the certificate are as follows.—"It is by this certificate in writing ascertained and determined as follows—The paid-up capital for the said undertaking to which the guarantee applied is the sum of £98,000; and the dividend thereon, at the guaranteed rate of 4 per cent., amounted for the half-year ending the 31st day of October, 1895, to £1960. 2. The gross receipts of the undertaking *for the half-year ending on the said last-mentioned day* amounted to the sum of £1330 12*s.* 6*d.* 3. The expenditure *thereof* amounted to the sum of £1144 11*s.* 8*d.* 4. The net receipts of the undertaking applicable to the payment of dividend at the guaranteed rate on the paid-up capital of the Company amounted to the sum of £186 0*s.* 10*d.*, showing a partial insufficiency in such net receipts for the payment of dividend, £1773 19*s.* 2*d.* 5. The sum of £1773 19*s.* 2*d.* being the amount of such partial insufficiency, is payable and to be contributed towards the guaranteed dividend on the paid-up capital of the undertaking under the presentment, &c."

The enactment which prescribes the certificate is the 9th section of the Order of the Lord Lieutenant. It directs that "the promoters shall on or before the 20th day of December . . . in every year make out and deliver to the said arbitrators an account for the then preceding half-year, ending on the said 31st day of October . . . showing the amount of the paid-up capital of the said undertaking, and a further account of all the receipts of every nature and kind for the then preceding half-year ending on the said 31st day of October . . . arising in any manner from the said undertaking, *and the expenditure thereof;* and the said arbitrators shall deliver their certificate in writing to the Secretary of the Grand Jury of said county before the 1st day of December . . . in each year, *ascertaining and determining* the amount in each half-year payable under said presentment by the said parts of baronies in respect of the said undertaking."

This section differs in many respects from the 6th section of the Act of 1883. The latter section directs that the arbitrators shall set forth "*the several matters determined by them*" in the certificate. The section we have to deal with describes the certificate as one ascertaining and determining the amount in each half-year payable under the presentment, and in defining the

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accounts to be rendered in relation to expenditure uses the words "and the expenditure thereof," which are the words used in the certificate. It seems to me clear that the word "thereof," in No. 3, refers to the immediately preceding antecedent (No. 2), viz. "the gross receipts of the undertaking for the half-year ending on the 31st October, 1895." The certificate deducts this expenditure from the gross receipts, and the difference, £186 0*s.* 10*d.* described as "Net receipts," must necessarily be the net receipts for the same half-year. This objection, therefore, in my opinion also fails.

In result, then, I am of opinion that the presentment, which, according to the *Ardfert Presentment Case* (1), and *Doherty's Presentment* (2) must be taken to refer to, and incorporate the certificate, shows, upon its face, all the facts necessary to bring it within the statutable jurisdiction, that it is valid upon its face, and consequently conclusive.

Hence, in my opinion, it necessarily follows that the liability of the Crown has been established, and that the judgment entered at the trial should stand.

Assuming, however, that I am wrong in this conclusion, and that my learned brothers are right in holding that the presentment is bad, by reason of matter not appearing on its face, viz. the inclusion of expenditure incurred in a previous half-year, another question arises: one which, if possible, is even of greater importance than that which I have already discussed, viz. the effect of the provision I have already referred to in section 7 of the Act of 1883, that if the Grand Jury fail to present the sum contained in the certificate, the treasurer shall insert it in his warrant, as if it had been *duly presented* by the Grand Jury, and the same *shall be* raised and levied accordingly, as if the same had been so presented.

Now, if the presentment be bad, it is a nullity, and consequently, the Grand Jury has failed to present the sum mentioned in the certificate, within the meaning of the above-mentioned 7th section. Was there, then, or was there not, a duty in the treasurer, in the events which happened, to insert the sum mentioned in the certificate in his warrant? for, if there was, as he has done so, the

(1) I. R. 3 C. L. 16. (2) [1895] 2 I. R. 493.

amount of it is, by the express language of the section, "to be raised and levied as if such sum had been duly presented by the Grand Jury to be raised and levied"; that is, "in like manner as any presentment made under the authority of" the 6 & 7 Wm. 4, c. 116.

Now, the treasurer of the county is a ministerial, not a judicial, officer. Assuming, for the purpose of the argument, that the certificate of the arbitrators, being the adjudication of a tribunal of a limited and inferior jurisdiction, would, in the absence of a statutable provision to the contrary (either arising from express words or from necessary implication), be subject to be quashed by this Court upon *certiorari*, upon its being shown, by facts not appearing upon its face, to be an adjudication, in the making of which the special tribunal had exceeded its jurisdiction, it must, I think, be admitted that the treasurer of the county, the ministerial officer, has no jurisdiction to enter into an inquiry as to any want of jurisdiction arising from such extrinsic circumstances. I admit that his duty to include the amount in his warrant depends upon the certificate before him being one which answers the description of the certificate in the statute, and that, therefore, if such certificate were bad upon its face, and consequently null, the treasurer would be without jurisdiction to include the amount; but it seems to me to be very clear that if the certificate is valid upon its face, and therefore does answer the description, contained in the section, of "*such* certificate," the treasurer is absolutely without jurisdiction, as he is without ability, to enter into any inquiry as to extraneous circumstances. He has not even authority to administer an oath.

Further, as the Judge of Assize has not the jurisdiction of the Queen's Bench to quash an adjudication of an inferior Court if good upon its face, even if he refused to fiat the presentment for the amount in the certificate, I cannot see how that refusal—a refusal which would leave that certificate an existing one, not declared to be invalid—could relieve the treasurer from the performance of a statutable duty, a duty not dependent upon the direction of the Court, but arising from the two facts of a certificate, good upon its face, having been laid before the Grand Jury at the specified Assizes, and of the absence of a presentment for the amount mentioned in it. No doubt the refusal to fiat would pre-

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vent the certificate acquiring any additional validity which it might derive from a presentment being made for its amount, but still, as it seems to me, the certificate, *qua* certificate, would remain in full force, and would necessarily continue to be a valid foundation for all such rights as flowed from it *proprio vigore*, that is, from a certificate the amount of which had not been presented. But the Act of Parliament has declared that the force of it, although its amount be not presented, is to impose a duty upon the treasurer to insert its amount in his warrant. Now, it is impossible to contend that it was the intention of the Legislature to confer upon the Judge of Assize an inoperative and unenforceable jurisdiction. If it intended that the Judge of Assize should have the jurisdiction and a duty to entertain and consider, as ancillary to fiating such a presentment, questions of alleged invalidity of the certificate by reason of extrinsic matter, surely it would not have so framed the statute that his decision to that effect not only might be, but, by the express words of the statute, must be, disregarded. Had he this jurisdiction, the only course he could adopt, in the event of his beingof opinion that the certificate was bad, by reason of extrinsic circumstances, would have been to refuse to fiat the presentment. But as, in that event, the Grand Jury would have failed to present, and the duty of the treasurer would arise, it seems to me conclusively to follow that, if the Judge of Assize has jurisdiction to determine that the certificate is bad by reason of extrinsic circumstances, his decision, within jurisdiction, not only might be, but by the words of the statute must be, disregarded by a ministerial officer.

For this reason I am clearly of opinion that the Judge of Assize had no jurisdiction to entertain objections to the certificate which do not arise upon its face, and that therefore he is bound to fiat a presentment for the amount of any certificate good on its face.

These considerations demonstrate that the particular words of this 7th section—words which, so far as I am aware, are not to be found in any corresponding Act of Parliament—render the certificate, if good upon its face, final and conclusive upon all parties.

It is said, however, that a conclusion such as this is contrary to the settled rule applicable to the validity of adjudications of Courts of inferior or special jurisdiction. I do not agree in this proposition.

I think it involves a *petitio principii*. I admit, that to the validity of an adjudication good upon its face of a tribunal of limited jurisdiction, two things are necessary—1, jurisdiction to enter upon the inquiry; 2, that throughout the proceeding, jurisdiction shall not be exceeded.

In the present case, the fact essential to jurisdiction to enter upon the inquiry is the delivery to the arbitrators of an account "for the then preceding half-year ending on" the 31st day of October, "showing the amount of the paid-up capital of the undertaking; and a further account of all the receipts of every nature and kind for the then preceding half-year, ending upon the said . . . day, . . . arising in any manner from the undertaking, and the expenditure thereof." In my opinion, it is not essential to the *jurisdiction to enter upon* the inquiry that the "further account" so delivered should, so far as regards items of expenditure, be confined exclusively to such as in all respects were legally within the description "and the expenditure thereof." If the account contained an item which was not expended in fact, or which, although expended in fact, was not so expended within the half-year; or, which, although expended within the half-year, was in respect of a matter which was not legally "expenditure thereof," the existence of that item would not, in my opinion, oust the jurisdiction of the arbitrators to inquire. Upon the contrary, they would have a duty to inquire into the fact of the expenditure, the time of it, and its nature, so as to enable them to determine whether it was properly included in the account. Therefore, in the present case, jurisdiction to enter upon the inquiry has been shown.

The next essential condition is that, throughout the proceeding, jurisdiction should not be exceeded. The main circumstances relied upon as showing an excess of jurisdiction in the course of the proceeding are two: 1, that certain items were allowed, as being within the description "the expenditure thereof," which in fact were expenditures during previous half-years; 2, that credit is not allowed for certain moneys which were received by the Company in respect of the working of the railway during such previous half-years.

The omitted credits were, in my opinion, properly omitted, as they related to a previous half-year. As regards, however, the

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first class of items objected to, no one can feel more strongly than I do the impropriety of their allowance. That allowance has imposed a grave injustice, not only on the Crown, but also upon the baronies; and I am far from clear that it cannot, even still, be redressed by an appropriate proceeding. That, however, is not the question here. The matter in hand now is whether the loss which has been caused by that erroneous allowance, for which neither the baronies nor the Crown can be held reponsible, is to be borne exclusively by the baronies, or is to be distributed between the baronies and the Crown, in the proportion of the sums they have respectively guaranteed. That in its turn depends upon a dry question of law, viz. whether the error was one within jurisdiction or one in excess of jurisdiction. In relation to this it is idle to dilate upon such topics as the injustice or fraud of the Company, or the negligence of the arbitrators. The injustice, the fraud, the negligence, if such there be, will, even if the suppliants succeed, affect the county as injuriously as it will the Crown. As between the county and the Crown the former is not responsible for these matters.

This latter question in its turn depends upon another, viz. whether the arbitrators had jurisdiction to determine *all* questions, as well *of law* as of fact, which were necessary to be determined, to enable a legal conclusion to be arrived at "ascertaining and determining the amount in each half-year payable under the original presentment of 1890 by the baronies in respect of the undertaking." If the jurisdiction of the arbitrators were limited, as is usually the jurisdiction of magistrates, to determine questions of fact only, then I would be of opinion that they had no jurisdiction to take into account, in arriving at the sum in their certificate, the items of expenditure which have been referred to. Upon this supposition the case would, in my opinion, be similar to one in which Justices had convicted without evidence, and in which consequently their decision would be null, and liable to be quashed on *certiorari*. If, however, the jurisdiction be to determine all questions whatsoever, either of law or fact, necessary to the ultimate determination of the amount payable in the half-year by the baronies, then the case assumes a wholly different aspect. The adjudication of such a tribunal cannot be impeached for error

in law, unless it appear upon the face of the adjudication; for where there is jurisdiction to determine a matter of law, a wrong determination of that matter of law is a matter within jurisdiction, and consequently cannot oust the jurisdiction. I understand this to be the *ratio decidendi* in *Regina* v. *St. Olave's* (1), and *Overseers of Walsall* v. *London & North Western Railway Company* (2).

Thus, the inquiry appears to me to be reduced to a very simple point; is the jurisdiction of the arbitrators, under section 9 of the Order of the Lord Lieutenant, one to determine facts only? Have they no jurisdiction to determine matters of law? In my opinion, the words of the section demonstrate that they have a jurisdiction and a duty to determine all questions either of law or of fact. They appear to me to be the only judicial tribunal which is interposed between the Company and the ratepayers in the determination of the amount payable by the latter. Their certificate under section 6 "shall be in all respects binding on the Grand Jury and the baronies and the Company." That jurisdiction cannot be exercised without deciding questions of law, should such questions arise; and I think it plain, upon the words of the section, that they have full and plenary authority to determine every question of fact or of law necessary to enable them to arrive at a just and right conclusion as to the sum which ought to be paid by the baronies to the Company; and I confess that I think that the provision in relation to the duty of the treasurer to which I have already referred at length, prevents the section being open to any other construction.

I should have arrived at this conclusion without hesitation upon the construction of the section, and without recourse to authority. There is, however, high judicial sanction for this view. In *The Queen* v. *County Clare Grand Jury* (3) the question arose as to whether the certificate, the entire amount of which had not been presented by the Grand Jury, was bad, by reason of a sum having been included therein as "working expenses" within the meaning of the 6th section of the Act of 1883. The case was heard upon appeal before four Judges—the late Lord Chan-

(1) 8 E. & B. 529. (2) 4 App. Cas. 30. (3) [1894] 2 I. R. 716.

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cellor, the Master of the Rolls, and Lords Justices Fitz Gibbon and Barry. Of these four, two, viz. the Master of the Rolls and Lord Justice Barry, decided that the certificate was good, although the sum so included was not "working expenses" within the meaning of that expression as used in the Act of Parliament. In giving judgment, the Master of the Rolls said (1) that he, for one, expressed no opinion as to whether the items about which the dispute had arisen were, or were not, properly "working expenses." But, notwithstanding this, he held that the certificate was binding and conclusive, distinguishing the case, in the commencement of his judgment, from one in which "the certificate had been made in respect of matters as to which the arbitrators had no jurisdiction." Lord Justice Barry goes further. He says (2) :— "These are not working expenses." Still he held that the certificate was conclusive. "I do not think" (he says) "the arbitrators ought to be a mere vouching body. It seems to me that the scope of the Act of Parliament was to create a *forum domesticum* to decide these questions, and in that view it enacts that one of the persons who must be on the Board of Arbitrators shall be the county surveyor—a public officer of the Grand Jury, whose duty it will be to see that nothing is done to interfere improperly with the interests of the ratepayers."

Lord Chancellor Walker says (3) :—"Now, what is the power and what are the duties of these arbitrators, one of whom is the skilled representative of the Grand Jury? They are the following, 'And such arbitrators shall, from time to time, ascertain and determine the amount of the gross receipts and of the net receipts.' They shall *determine* it; that is not a mere matter of vouching, but of determination. The section then goes on—'And also any other matters which it may appear necessary to inquire into and determine upon.' They have therefore the widest power of ascertaining what are the expenses of management and working expenses. It is a case in which the very thing which is referred to the arbitrators, is the question which Mr. Fitzgerald said they have determined wrongly, namely, the amount of working expenses, the expenditure on which has been challenged as illegal. Further,

(1) Page 720. (2) Page 722. (3) Page 717.

Mr. Fitzgerald contended in his argument that the arbitrators had no power to determine these matters at all, because they were beyond their powers. But that is directly contrary to the words of the Act of Parliament, which provides that 'the arbitrators shall set forth the several matters so determined by them in certificates under their hands, or, in case they do not agree, under the hands of any two of them, and such certificates shall be, in all respects, binding on the Grand Jury, and the baronies and the Company.' The next step is the delivery to the Secretary of the Grand Jury of the certificate, evidencing the adjudication of the arbitrators; and when that takes place the enactment which I have already read comes into force, and the Grand Jury are, in my opinion, *bound* to present the specified sum. It would be extremely inconvenient that a fluctuating body like the Grand Jury should enter into the consideration of such legal questions as have been discussed before us."

Lord Justice FitzGibbon says (1):—"The field of the jurisdiction of these arbitrators goes beyond mere figures and book-keeping; it necessarily extends to deciding what are 'working expenses.' This is sometimes a mixed question of law and fact, sometimes a pure question of law, sometimes a pure question of fact. The same question might arise if the arbitrators were appointed by contract, and such arbitrators are often appointed by contract to decide questions of law, or mixed questions of law and fact. These statutory arbitrators are better constituted than private arbitrators for dealing with difficult questions; they are appointed for public purposes and by public authority; they represent both the parties and the public, and the accounts with which they deal are submitted to an authoritative audit. I consider that they were appointed to decide just such questions as are brought before us here, and their decision is final."

The error in decision there—if it were an error—although in instance different, was in principle the same as that which has occurred here. If jurisdiction is exceeded by including in "working expenses" a sum which is not working expenses, the jurisdiction is exceeded, whether that result is arrived at by including,

(1) Page 720.

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as in the *West Clare Case* (1), a sum of money which, although expended within the half-year in question, was not "working expenses," or by including therein "working expenses" of a different half-year.

For these reasons I am of opinion—1, that the presentment is valid, and that consequently the Crown is bound to recoup the county a moiety of the sum levied under it; 2, that the certificate is good on its face, and that this Court has no jurisdiction to entertain alleged objections to it, said to arise from extrinsic facts; 3, that, as the certificate is good, the Crown's proportion of the sum levied is recoverable from them, even if, for any technical reasons, the presentment be bad.

In my opinion the judgment for the suppliants should stand.

It was accordingly ordered:—

> ". . . On reading the writ of *certiorari*, the order for the said writ, the presentment, and the arbitrators' certificate, filed as a return to the said writ, and the joint and several affidavit mentioned in and grounding the said order, . . . It is considered and adjudged by the Queen's Bench Division, now here, that the presentment and the arbitrators' certificate in the premises, in return set forth, the subject-matter of the writ of *certiorari* herein, be, and each of them is hereby, severally quashed. Each party to abide their own costs."

And, as a separate order (on the motion in the petition of right):—

> ". . . It is ordered that the said judgment directed to be entered herein by the Honourable Mr. Justice Boyd at the trial hereof, in Hilary Sittings, 1898, for the suppliants, for the sum of £886 19*s.* 7*d.*, and costs, be, and the same is hereby, set aside, and that judgment be entered for the suppliants for the sum of £477 2*s.* 8*d.*, only; and that the parties respectively do abide their own costs of the petition of right, of the trial thereof, and of this motion and arguments thereon."

Solicitor for the Crown: *Sir P. Coll.*

Solicitor for the suppliants (and respondents): *S. P. Redington.*

A. E. R. J.

(1) [1894] 2 Ir. R. 691.

EYRE *v.* COEN (1).

(1898. No. 12,325.)

Q. B. Div.
1898.
Oct. 28.

Landlord and tenant—Land Law (Ir.) Act, 1896 (59 & 60 *Vict. c.* 47), *s.* 16.

Where the tenant of a holding to which the Land Law Acts apply is ejected for non-payment of rent, more than two years' rent being in arrear, and pays, in order to be restored to possession, two years' rent, as provided by the Land Law (Ireland) Act, 1896, sect. 16, the landlord is at liberty to appropriate such payment to the earliest portion of the tenant's indebtedness.

MOTION for final judgment under R. S. C. (Ir.) Order XIV., Rule 1.

The defendant was tenant to the plaintiff of an agricultural holding in county Galway at a rent of £28 10*s.* per annum. £171, being six years' rent, from the 1st November, 1890, to the 1st November, 1896, being in arrear, the plaintiff had on the 31st March, 1897, obtained a decree in ejectment, setting out the particulars of such six years' arrears. The defendant, availing himself of the provisions of section 16 of the Land Law (Ireland) Act, 1896, paid two years' rent, and was thereupon restored to his tenancy. Upon this payment being made the landlord gave a receipt for rent to the 1st November, 1892.

The landlord now sued the defendant upon a specially endorsed writ for £156 15*s.* 0*d.*, five and a-half years' rent from November, 1892, to May, 1898. The defendant entered an appearance in the action, but was not represented on the present motion.

Hynes, for the plaintiff, submitted that upon these facts the plaintiff was entitled to judgment for the amount claimed, the 16th section of the Act of 1896 not interfering with the landlord's personal remedy against the tenant for the residue of the arrears, and permitting the parties to appropriate the redemption-payment to that portion of the debt that was of earliest date, so that in this case no question could arise under the Statute of Limitations.

THE COURT gave liberty to mark judgment for the amount sued for, £156 15*s.*

Solicitor for the plaintiff: *H. H. Langrishe.*

A. E. R. J.

(1) Before ANDREWS and JOHNSON, JJ.

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Appeal.

April 28–30. June 11.

THE QUEEN (CORPORATION OF DUBLIN) *v.* DUBLIN METROPOLITAN POLICE MAGISTRATES (1).

Market—Markets and Fairs Clauses Act, 1847 (10 & 11 *Vict. c.* 14)—*Special Act—53 & 54 Vict. c. ccxlvi—Smithfield Market—Tolls on hay and straw —Summary jurisdiction—Incorporation of statute—Construction of statute.*

Section 39 of the Markets and Fairs Clauses Act, 1847, provides a summary procedure for the recovery of tolls. Section 1 of the same Act declares that its provisions are not to apply except where it is incorporated by the Special Act authorising the undertaking.

The Act was expressly incorporated by the Dublin Improvement Act, 1849 (12 & 13 Vict. c. 97, s. 71), which, however, contained a clause (sect. 82) declaring that Smithfield Market should at all times remain a free and open market. The Dublin Improvement (Amendment) Acts of 1861 (24 & 25 Vict. c. 26) and 1864 (27 & 28 Vict. s. cccv) recite the Act of 1849, and each of these Acts contains a clause directing that it is to be read along with the Act of 1849 and the Acts incorporated therewith.

The Dublin Corporation Act, 1890 (53 & 54 Vict. c. ccxlvi) recited the Acts of 1849, 1861, and 1864, that some of their provisions required amendment, that it was expedient to authorise the Corporation to take tolls in Smithfield Market, and (by section 86) enacted that when that Market should be completed and opened for use the 82nd section of the Act of 1849 was to be repealed and the Corporation entitled to charge the tolls mentioned in the schedule to the Act on hay and straw exposed for sale.

After the completion of the Market, the Corporation, relying on section 39 of the Markets and Fairs Clauses Act, 1847, sought to recover these tolls on a summons before the Chief Metropolitan Police Magistrate, who held that he had no summary jurisdiction as to the same.

The Corporation having obtained a conditional order for a mandamus to compel the magistrate to hear and determine the summons:—

Held, by the Court of Appeal (reversing the decision of the Queen's Bench Division), that the Markets and Fairs Clauses Act of 1847 was not incorporated with the Act of 1890, and that consequently the tolls could not be summarily recovered before the magistrate.

The mere fact of two statutes being *in pari materia*, even with an express provision that both shall be construed together as one Act, is insufficient to

(1) In the Queen's Bench Division, before Sir P. O'Brien, L.C.J., and O'Brien, Johnson, and Madden, JJ.

justify the application to a new subject-matter in the second Act of the provisions of the earlier Act.

Ward v. *Stevenson* (1 New Sessions Cases, 162) approved.

MOTION to make absolute a conditional order for a mandamus to compel the police magistrates of the city of Dublin to hear and determine summonses issued by the Corporation against the respondents for refusing to pay tolls on hay and straw exposed by them for sale in Smithfield Market.

The Right. Hon. The Mac Dermot, Q.C., O'Connor, Q.C., and *P. A. O'C. White*, for the Corporation of Dublin, in support of the conditional order.

Ronan, Q.C., O'Shaughnessy, Q.C., Ignatius O'Brien, and *T. M. Healy, contra.*

Cur. adv. vult.

Feb. 23.

O'BRIEN, J. :—

The Corporation of Dublin, under a private Act of 1890, (53 & 54 Vict. c. ccxlvi) have a right to take tolls on hay and straw exposed for sale. Under the Dublin Improvement Act of 1849 (12 & 13 Vict. c. 97) they had a right to make a charge for weighing; but it was optional with the parties to weigh in their scales, and the Schedule to the Act is ingeniously constructed with a view to the effect of making the two kinds of charge alike compulsory. They sued for this toll before a Divisional magistrate, who held that he had no jurisdiction; and a mandamus has been applied for. The point is one merely of procedure, and it turns on the question whether the Markets and Fairs Clauses Act of 1847 (10 & 11 Vict. c. 14) applies to Smithfield Market. In the 1st section of that Act it is declared that it shall not apply except where it is incorporated by the special Act authorising the undertaking; and the effect of the 2nd section is that the application of the statute is enlarged to embrace any Act regulating markets, for otherwise it might be confined to those established for the first time.

The objection is that the Dublin Acts, which authorise and regulate the market, do not incorporate the Markets and Fairs Clauses Act; and, on the other hand, that those which do incor-

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porate it do not authorise the tolls. The statute of 1847 is incorporated with the Dublin Improvement Act of 1849: but the latter Act, while allowing toll to be taken for weighing, where the machinery of the Corporation is used, contains in section 82 a positive declaration that Smithfield shall at all times remain a free and open market. While this was the state of things, two subsequent Acts relating to the City of Dublin were passed in the year 1861 and 1864, both also expressly incorporating the Markets and Fairs Clauses Act. These Acts, which, save that of 1864, were all public statutes, are still in operation. However, the Dublin Corporation Act of 1890, which is a private statute, while called an Act to amend the Dublin Improvement Acts from 1849 to 1864, and stating in the preamble that this is the object of it, and while repealing sect. 82 of the Act of 1849, so as to bring Smithfield Market within it, and at the same time greatly enlarging the area, has omitted any clause of incorporation; so that the point comes to this that, where the power to levy the tolls is found, the clause of incorporation is wanting, and, *e converso*, where the clause of incorporation is inserted, no power to levy tolls is given.

On the one side it is contended that there was really no incorporation at all with the Acts previous to 1890, for you cannot incorporate what is omitted; while, for the Corporation it was argued that what is in section 82 of the Act of 1849, as to Smithfield Market, was merely an exception—a kind of dam that stopped the stream for a time—and when it was taken away and the channel opened, the provision of the Markets and Fairs Clauses Act flowed into the subsequent legislation. And especially it is urged that a statute expressly passed for amending another statute has the effect of making the latter a part of it, not merely for construction, but for substantive enactment, so that the whole series of Dublin Acts becomes the special Act which is required to be incorporated with the Markets and Fairs Clauses Act. There was further the distinct argument that, unquestionably, for the purpose of the toll for weighing, the Act of 1849 must still be adopted.

It certainly is in accordance with common sense, and with the intention, that the general Act should apply wherever there was a market to which it was once extended by statutes that are in

existence. But I confess I am not quite satisfied with the reasoning that a statute amending another identifies that other with it as to all its provisions so as to make them apply to a new subject. The last Act is a distinct statute, and capable of satisfying the description of "the Special Act," which is required to incorporate the Clauses Act, and does not do so; and this is the Act which authorises the toll. If we could interpret the special Act as including any number of statutes connected with each other, one of which incorporated the general Act, and could project that effect into Acts subsequent to it, the difficulty would be overcome. But I should have great hesitation in adopting that mode of bridging over the chasm if this were a question of right—if the legality of the toll was the matter in question—which it cannot be. I am rather disposed to adopt the solution that this is a matter not of right to the toll, but of the procedure, which procedure is unquestionably applicable to the toll for weighing, and that procedure, once established by the Act of 1849, must be considered still to continue. I am therefore of opinion that the view of the magistrate was not correct, and that the mandamus ought to be granted.

JOHNSON, J.:—

The question for decision is whether, under the Dublin Improvement Acts, the hay and straw toll for weighing and standing in Smithfield Market is summarily recoverable before a Justice.

The governing Act which prescribes and regulates the municipal powers, duties, and remedies of the Corporation of Dublin in respect, *inter alia*, of the markets, including Smithfield, is the Dublin Improvement Act of 1849 (12 & 13 Vict. c. 97, s. 71), which is a public Act, and incorporates, amongst other Acts, the Markets and Fairs Clauses Act of 1847, except section 13 and such of its clauses as are expressly varied or inconsistent with the Act of 1849. The Markets and Fairs Clauses Act, and the Dublin Improvement Act of 1849 thus constitute one statute. The Lord Mayor is sole Clerk of the Dublin Markets (section 72); power is given to make bye-laws, subject to penalties, for the control and regulation of the markets (sections 73, 74), and to appoint and remove deputy clerks of markets; and the detection and summary punishment of frauds in the markets is also provided for (sections

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75–77). These provisions are applicable to all the Dublin Markets, including Smithfield, which, however, is by section 81 of the Act of 1849, "a free market" without toll "for the standing of any beast or animal or cart of hay or straw exposed for sale in the market." Subject to this exception, in all the markets the office of weighmaster under the 4th Anne (Ireland) is abolished (section 82); power is given to the Lord Mayor to appoint weighmasters "for the purpose of weighing all such hay and straw in Smithfield as shall be brought to them for that purpose"; and the fees or tolls for weighing are specified in Schedule E to the Act of 1849. The vendor of any article in the market is bound, on the buyer's requisition, to have it weighed in market scales and to pay the statutory toll (Markets and Fairs Clauses Act, 1847, sects. 33 to 38); and, besides the remedy by distress, tolls (including the weighing tolls in Smithfield, as in the other markets), and penalties are made summarily recoverable (section 52). Thus, Smithfield Market was in 1849 subjected to all the provisions of the governing Act in respect of weighing toll and the summary procedure for its recovery. In 1861 it was found expedient to amend the governing Act by the 24 & 25 Vict. c. 26—also a public Act—and to give further and additional powers (not affecting markets) to the Corporation. In 1864 the Acts of 1861 and 1864 were further amended (but not in respect of the markets) and further powers were given to the Corporation by the 27 & 28 Vict. c. cccv. (a local Act) for the municipal administration and control of the city. The Act of 1861 contains a clause expressly incorporating the governing Act of 1849 and the incorporated Acts, to be read and construed as one Act with the Act of 1861; and the Act of 1864 contains a similar clause comprising also the previous Act of 1861. In 1890, the 53 & 54 Vict. c. ccxlvi—a local Act—was passed, entitled an Act "to amend the Dublin Improvement Acts, 1849 to 1864, and to make further and better provisions" in relation to specified matters and for other purposes. It recites, *inter alia*, the Act of 1849, amended by the Acts of 1861 and 1864; that some of the provisions of those Acts require amendment; and, *inter alia*, that "it is expedient to authorise the Corporation to take tolls in respect of cattle, hay, and straw exposed for sale in Smithfield, and to extend its limits." This

Act is divided into eight parts, each dealing with a distinct subject-matter. Part VI. deals with "Markets and Abbatoir"; and, by section 86, gives effect to the preamble by providing that when Smithfield Market is paved, completed, and open for public use, section 81 of the Dublin Improvement Act of 1849 shall be repealed, and the Corporation may demand and take toll for standing of cattle and for carts of hay and straw exposed for sale in the market not exceeding the toll in the First Schedule. This is the only market toll dealt with by this Act. The other parts of the Act deal with subjects not comprised in the governing Act of 1849, or the amending Acts of 1861 and 1864; and, accordingly, in respect of these new matters, it creates new offences and penalties, and provides for new obligations and costs and expenses, and makes express provision for their prosecution and recovery; but it contains no clause similar to that in the Acts of 1861 and 1864 expressly incorporating the governing Act of 1849 and the Acts therewith incorporated; and the argument for the defendants is, as I understand, mainly rested on this omission.

These four Dublin Improvement Acts, 1849 to 1890, constitute one progressive system and code of legislation, with one clear and uniform object and purpose expressed by the Legislature in each and all of them viz.: the improvement of the city of Dublin by investing the Corporation with municipal powers for that purpose, and (as such powers would be useless without it), the means of legally enforcing compliance with the lawful regulations of the Corporation pursuant to those powers. The Act of 1890 accordingly provides that when the Corporation on their part shall have "paved and completed Smithfield Market, and opened" this improved and extended market for the use of the public, then (but not until this condition is fulfilled on their part for the public benefit) the exemption by section 81 of the Act of 1849 shall be removed, and the Corporation authorised to take the toll exempted by that section for hay and straw; and the remedy for enforcing that toll which appears to have commended itself to the Legislature was by amalgamating it with the weighing toll, the summary recovery of which had been provided for by the governing Act.

I think the facts in the present case make it an exceptional case in the construction of statutes. These Acts appear to me to be a

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code of statutes consistent in one object, progressive and uniform for the attainment of that object, and linked together for that purpose; and I therefore think that, according to the ordinary and well-established rules of construction, they are to be read and construed together, the object and intention of the Legislature throughout being uniformly expressed. The governing Act gave the weighing toll and the summary means of enforcing it. The Act of 1890 (when the condition of things is fulfilled), gives the standing toll, and blends into one toll both the weighing and standing toll. The note in Schedule 1, to the Act of 1890, provides that "tolls in relation to hay and straw, grass and litter, include the charge for weighing at the Corporate weigh-houses or bridges," thus making one blended toll of the two tolls for weighing, under the governing Act of 1849, and for standing, under the Act of 1890. No new provision is expressly made for the recovery of this blended toll; and I think it would be an unreasonable construction of the statutes that the Legislature intended that the weighing toll alone should be summarily recoverable, but that when blended with the standing toll it was not so recoverable, and that the standing toll should not be summarily recoverable. It is an unusual mode of drafting, even of a statute, but I think that the Legislature has expressed its intention that both tolls, amalgamated into one toll, should be recoverable in the same way, and by the same means, that is, as provided in respect of the weighing toll by the governing Act. I am therefore of opinion, that the conditional order should be made absolute.

MADDEN, J.:—

I concur. It is quite true that the Dublin Corporation Act of 1890, taken by itself, does not incorporate the Market Clauses Act of 1847. It is equally true that this general Act must be expressly incorporated in order to make its provisions applicable to any particular market. But the Act of 1890 cannot be taken by itself. It is incorporated with and forms part of the Dublin Improvement Act of 1849. This incorporation does not result merely from the circumstance that they are Acts *in pari materiâ*. No doubt statutes *in pari materiâ* are for purposes of construction regarded as one code; but I should hesitate to hold that this principle of construc-

tion taken by itself would operate to incorporate in a later statute a general Act expressly incorporated in an earlier statute dealing with the same subject matter. This, I conclude, is the view which is also taken by my brother O'Brien. But the connexion between the Dublin Acts of 1849 and 1890 is much closer than that which exists between two statutes *in pari materiâ*. The latter is an amending Act, which recites, and thus expressly incorporates the former, which is the principal and governing Act. The principal Act expressly incorporates the Market Clauses Act. The policy of the Legislature in providing general consolidation Acts, such as the Lands Clauses Acts, the Railway Clauses Acts, the Companies Clauses Acts, and the Act now before us, seems to require that the inclusion or exclusion of the Consolidation Act, effected by the principal statute regulating the case of each particular undertaking, should hold good not only for the principal and governing statute taken by itself, but for this statute as amended by subsequent Acts, which are for this purpose to be treated as one statute. The practical inconvenience of an opposite conclusion has been already pointed out by the other members of the Court. The question, in my opinion, is not whether the Act of 1890 incorporates the Market Clauses Act, but whether the latter statute is incorporated by the Dublin Improvement Act of 1849, as amended; and I think that this question must be answered in the affirmative.

O'BRIEN, J., stated that the Lord Chief Justice, who had heard the arguments, had authorised him to state that he concurred in the decision.

A. E. R. J.

The hay merchants appealed from this decision to the Court of Appeal, Lord Ashbourne C., Palles C.B., Fitz Gibbon, and Walker, L.JJ.

Ronan, *Q.C.*, and *O'Shaughnessy*, *Q.C.* (with them *Ignatius O'Brien*, and *T. M. Healy*), for the appellants.

The Rt. Hon. The Mac Dermot, *Q.C.*, and *O'Connor*, *Q.C.* (with them *P. A. O'C. White*), for the respondents.

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The following authorities were cited:—*Ward* v. *Stevenson* (1); *Cherry's Settled Estate* (2); *Re Mills' Estate* (3); *Mather* v. *Brown* (4); *The Queen* v. *Smith* (5); *The King* v. *Trustees of Norwich Road* (6); *Waterlow* v. *Dobson* (7); *M'William* v. *Adams* (8); *R.* v. *Broderip* (9); *R.* v. *Cunningham* (10); Com. Dig. vol. v.; Coke's Inst. iv. p. 274.

Cur. adv. vult.

June 11.

LORD ASHBOURNE, C.:—

In this case the Town Clerk of Dublin, on behalf of the Lord Mayor, Aldermen and Burgesses of Dublin, issued summonses against the appellants for refusing to pay tolls for the exposure for sale of cart-loads of hay and straw at Smithfield Market.

When the summonses came before Mr. Wall, Q.C., Chief Metropolitan Police Magistrate for Dublin, he ruled that he had no jurisdiction, and the following is the entry of his order on the charge sheet: "Counsel for the Corporation stating that the summons comprised only two-penny tolls given for standing of hay and straw in Smithfield by the Dublin Act, 1890, I hold I have no jurisdiction as to such tolls in Act 1890, which does not incorporate Markets and Fairs Act, 1847, or otherwise confer any summary jurisdiction as to the tolls for hay and straw standing at Smithfield exposed for sale."

The Corporation being dissatisfied with this ruling, obtained a conditional order from the Queen's Bench Division for a *mandamus* to compel the Chief or other Divisional Justices of Dublin to hear and determine the said summonses. Cause was shown against this conditional order, and the full Court of the Queen's Bench Division, after argument, granted the *mandamus*. From their order this appeal has been brought. It raises some interesting points which have been fully argued before us.

The main question involved is, whether the Markets and Fairs Clauses Act of 1847, applies to Smithfield Market. If it does not, the *mandamus* should not issue, and the appeal must be allowed.

(1) 1 New Sessions Cases, 162.
(2) 4 De G. F. & J. 332.
(3) 34 Ch. D. 24.
(4) 1 C. P. D. 596.
(5) L. R. 1 C. C. R. 266.
(6) 5 Ad. & E. 563.
(7) 27 L. J., Q. B. 55.
(8) 1 MacQ. 120.
(9) 5 B. & C. 239. [373.
(10) 16 L. R. Ir. 206; 18 L. R. Ir.

That Act expressly declares that it shall not apply except where it is incorporated by the special Act; and its sections provide that even when it is incorporated it shall only apply to markets in respect of which there are "undertakers" as defined.

Is this general Act of 1847 incorporated in the Act of 1890? It is expressly incorporated in the public Acts of 1849 and 1861, and it is not mentioned in the private Act of 1864 or the private Act of 1890, and this compels the Corporation, who are unable to rely upon any clear express words, to rest their case upon inferences, suggestions, probabilities. It is necessary before considering the Act of 1890, to realise closely and accurately, the relation of the general Act of 1847 to Smithfield Market under the Act of 1849. The general Act is expressly incorporated and its provisions as to tolls (sects. 31-41), apply to all markets in Dublin to which there were "undertakers." The definition of "undertakers" in 10 Vict. c. 14, s. 2 is "the persons authorised by the special Act to construct or regulate the market or fair." Are the Corporation of Dublin "undertakers" of Smithfield Market under the Act of 1849? This is a question of difficulty and it is not necessary for our decision. The Corporation are given ample powers in reference to other markets of which they are clearly "undertakers." But, in reference to Smithfield, what is their position? The 81st section declares it to be "at all times a free cattle, hay, and straw market; and that it shall not be lawful for the Lord Mayor or Council to demand or take any toll for the standing of any beast, or animal, or cart of hay or straw, exposed for sale in the said market." When one looks outside this clear and emphatic section, there is nothing to be found, I think, sufficient to support—at all events free from doubt—a contention that the Corporation can be regarded under the Act of 1849 as "undertakers" of Smithfield Market. It is true that the Lord Mayor is declared to be Clerk of the Markets in Dublin, and given a power as such Clerk of the Markets to make bye-laws against frauds therein, and for other purposes; and to appoint and remove assistants; and to appoint weighmasters in Smithfield who may take halfpenny fees for weighing. These limited powers would not, I am disposed to think, suffice to make the Lord Mayor, and they do not purport to make the Corporation, "undertakers"

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of Smithfield Market; but this point is not free from doubt. Mr. Ronan has pointed out, I think with effect, that it is impossible on a reading of the sections of the Act of 1849, not to recognise that a clear distinction is kept up between the Lord Mayor and the Corporation. Thus, section 84 gives the Lord Mayor a power of taking a halfpenny toll for weighing in Smithfield, while section 90 gives a similar power over the markets generally to the Corporation. I do not think that the question, on the construction of the Act of 1849, would be much advanced if it could be shown that Smithfield belonged to the Corporation.

But whether the Corporation can be regarded as "undertakers" of Smithfield Market or not, the really important point remains—what is the true way to regard section 86 of the Act of 1890? Is it a mere amendment of the Act of 1849, so far as Smithfield is concerned; or must it be regarded as a new substantive enactment in reference to that market?

There is little calling for note in the Acts of 1861 and 1864, and everything must really depend upon any considerations which may be found in the Act of 1890. Section 86 is a clear but novel section. Can the tolls given by it be recovered summarily before a Divisional Justice in Dublin? They can be readily recovered otherwise on the requisite proofs being given. The only way the tolls under that section can be recovered summarily is by the aid of the general Act of 1847. The Corporation insist that they are entitled to rely upon that Act, as they argue that although not expressly, it is impliedly incorporated. They say that it is incorporated in the Acts of 1849, 1861, and 1864, all *in pari materiâ* with the Act of 1890—that the code must be taken as a whole, that the four Improvement Acts of Dublin must be read together as the special Act, and that the general Act of 1847 must be held to be incorporated in this special Act—the Dublin Improvement Act, 1849, as amended.

This is a plausible statement which requires examination to test its soundness and see if the parts can be made to fit in. But attention must be concentrated on Smithfield Market, and then the question narrows itself at once to the inquiry, is the Act of 1890, a mere amending Act, or a new enactment? If the Act of 1847 had no previous application to Smithfield, if before the Act of 1890

the Corporation had no power to levy any tolls in Smithfield, what was there to amend? The mere repeal of section 81 of the Act of 1849 could not allow the introduction of the provisions of the general Act of 1847. But section 86 of the Act of 1890 is much more than a mere repeal of section 81 of the Act of 1849. It increases the limits of the market and enacts that "when and so soon as the market of Smithfield has been paved and completed and is open for the use of the public, section 81 of the Dublin Improvement Act, 1849, shall be repealed, and it shall thereupon be lawful for the Corporation to demand and take such stallage fees and tolls for the standing of cattle, and for hay or straw exposed for sale in the said market, as they shall from time to time appoint, not exceeding the several stallage fees and tolls specified in the First Schedule to this Act." This is a perfectly new enactment, giving for the first time the Corporation power to take fees and tolls in Smithfield, and enlarging its area. I do not think that the Corporation has shown that they are entitled to recover these tolls summarily under the general Act of 1847. The whole argument for the Corporation has been in effect to show that this Act was by implication or construction to be read with the Act of 1890, which alone of the four Improvement Acts omitted to expressly incorporate it. The incorporation of Acts by implication can only be done on clear grounds and on cogent arguments. The authorities all show this. The case of *Ward* v. *Stevenson* (1), discovered by the wise and cautious research of the Chief Magistrate—although the report of the judgment of Lord Denman is very short—is much in point; as are also the cases of *Cherry's Settled Estate* (2), and *Re Mills' Estate* (3), and *Mather* v. *Brown* (4). The fact that the Act of 1847 creates offences and imposes penalties is also important because Bovill, C.J. (*Queen* v. *Smith* (5)), well points out that the law is against extending penal enactments by construction. I believe that the conclusion at which I have arrived is not at all technical, and that public policy and the reasonable construction of the Acts of the Legislature supports it. An attentive perusal of the other sections of

(1) 1 New Sessions Cases, 162.
(2) 4 De G. F. & J. 332.
(3) 34 Ch. D. 24.
(4) 1 C. P. D. 596.
(5) L. R. 1 C. C. R. 266.

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the Act of 1890 also strengthens it and shows that Parliament must be assumed to have contemplated the appropriate legal remedies in each case with which it dealt, and when summary jurisdiction was intended it was expressly stated. Thus (*inter alia*) section 26 allows certain expenses to be recovered "as a debt in due course of law," whilst others "may be recovered in a summary manner;" section 49 enables penalties to be recovered before a magistrate; sections 50 and 96 give substantial penalties, not saying how they are to be recovered; section 97 gives penalties summarily recoverable; and then comes section 103, saying that penalties "not otherwise provided for" should be recovered summarily. The Mac Dermot relied on the words "not otherwise provided for" as indicating a kind of inferential reference to penalties, "otherwise provided for" in the general Act of 1847, but the words plainly referred to such sections as 50 and 96 (already mentioned), where penalties were given and no provision was at the same time made as to the method of recovery.

But section 86 itself suggests the most cogent reasons for a belief that Parliament did not contemplate summary procedure in reference to its provisions. It is a very serious new enactment. It declares that the old free market of Smithfield should be no longer free, and that the Corporation should for the first time have the right to get substantial fees and tolls therein, but this great change was only to take place "when and so soon as the market of Smithfield had been paved and completed and was open for the use of the public." The repeal of the old declaratory section 81 of the Act of 1849 was made to depend upon the completion of a considerable work that might involve much expense and take much time. As a fact it took six years. It might have taken longer or it might never have been done at all. Is it an unreasonable intention to impute to Parliament that it considered it fair and just to leave the decision of the claim of the Corporation that the old section 81 had passed, been "paved," away, and their new rights under section 86 of the Act of 1890 had become operative, to be tested, if disputed, not summarily in a police Court, but in an action "in due course of law"? I cannot think it unreasonable, or that it will substantially prejudice the Corporation. If anyone

seriously contests their rights, it will be at the peril of costs, and once they are established, they will, I should think, be acquiesced in. But whether the result be convenient or whether it be cumbrous, we have only to determine the legal construction of the Acts of Parliament discussed before us; and for the reasons I have given, I think that the appeal should be allowed with costs.

PALLES, C.B.:—

I am unable to find in the various statutes which have been referred to at the bar any indication of an intention in the Legislature to apply section 39 of the "Markets and Fairs Clauses Act" of 1847 to the tolls authorised to be taken by section 86 of the "Dublin Corporation Act" of 1890. In my opinion the settled rules applicable to the construction of statutes coerce to the conclusion that the will of the Legislature was not directed to the question, and that in this respect there is a *casus omissus* which we have no power to supply; as to do so would be to make law, not to interpret it.

There are two distinctions in kind between the tolls authorised by section 86 of the Act of 1890 and those prescribed by section 87 of the Act of 1849: (1), the markets are different; (2), the commodities in respect of which the tolls are to be taken are different. I base my judgment wholly on the second distinction. I say this, because it seems to me that there is grave reason for holding that section 86 of the Act of 1890 impliedly declares that Smithfield Market was then, and had always been, the property of the Corporation. If this be so, the Act of 1849 must be construed with regard to that declaration, and, therefore, had it not been for section 81, Smithfield Market would have been within the description of "markets" in section 87 of that Act. Thus, the operation of section 81 would have been to except Smithfield out of the general category of "markets belonging to the Corporation" comprised in section 87; and the simple repeal of section 81 would have extinguished the exception, and have brought Smithfield Market within the 87th section, to which section 39 of the

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Act of 1847 applies. If, then, the tolls authorised by each of the two sections had been identical, there might have been ground for contending that the new express authority to levy them would have been no more than a repetition *ex abundanti cautelâ* of that which, without them, would have been effected by the simple repeal.

This supposed case, however, is not that with which we have to deal. Neither section 87 nor any other provision in the Act of 1849 authorises tolls in respect of hay or straw; the tolls for these commodities authorised by the Act of 1890 are wholly new, and could not be authorised by any extension of the subject-matter of section 87 of the Act of 1849.

I proceed to consider the effect of this distinction in respect of the tollable commodities. I give the amplest effect to section 1 of the Act of 1847 by holding that all the sections of that Act must be deemed to be incorporated with that of 1849, and to be applied to all the markets mentioned in that Act, "so far as the same" are "applicable"; but the applicability of the group of sections as to tolls, of which section 39 is one, is limited to such tolls as are created under the Act, and of these the only market tolls are those authorised by section 87. They clearly cannot apply to market tolls in Smithfield Market, because any such tolls are prohibited by section 81.

I read, then, the Act of 1849 as authorising the taking of tolls in the markets of the Corporation in respect of certain specified commodities, and enacting that a Divisional Justice shall have jurisdiction over disputes as to such tolls.

Then comes the Act of 1890. It recites that "some of the provisions of the above-mentioned Acts," including that of 1849, "required amendment," and after further numerous recitals it proceeds:—"that it is expedient to authorise the Corporation to take tolls in respect of cattle, hay, and straw exposed for sale in Smithfield Market, and to extend its limits." By section 86 it enacts that so soon as Smithfield has been paved and completed, and is open for the use of the public, section 81 of the Act of 1849 shall be repealed. The section then proceeds to authorise certain tolls, and to extend the limits of Smithfield Market so as to include certain streets which were not theretofore within it.

What is the rule of interpretation applicable to two such statutes? The first authorises tolls in certain markets, and gives a Justice jurisdiction in respect of them. The second (which in part amends the former Act, and in part confers new powers upon the Corporation) authorises new tolls in respect of commodities not previously tollable, in a market theretofore free from toll; but the later Act does not, either by express enactment, or by express incorporation of any other Act, give jurisdiction to Justices in respect of such tolls. Does the second Act impliedly apply to the tolls created by it the provision contained in the first Act as to the jurisdiction of the Justice?

To make clear my opinion upon this question, I must distinguish between two different classes of amending provisions.

(1) If a second Act amended a previous one by so altering a provision theretofore existing in the previous one as to preserve in its altered state the identity of the previously existing provision, I conceive that, as to the subject-matter of such class of amendments, all the provisions of the former Act must continue to apply to the continuing provision in its altered state. I illustrate my meaning by referring to the alteration by section 86 of the limits of Smithfield Market. I hold that all the provisions of the Act of 1849 which apply to Smithfield Market in its former state continue under the Act of 1890 to apply to Smithfield Market as extended, save so far as those provisions are altered by the later Act.

(2) Where, however, the subject-matter to which we are asked to apply the previously existing provisions as to tolls is a matter in respect of which no tolls were previously authorized, the authority to take tolls in respect of it is not an alteration of any previous provision, but is a power wholly new. The proviso conferring such new authority is not in strictness an amendment at all, and the question of the applicability to the subject-matters of those provisions of sections of former Acts is different from that in relation to the first class of provisions I have referred to.

It is said, and no doubt it is true, that both the Acts are *in pari materiâ*, and that although there is no express clause of incorporation, both should be construed together, as if they

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were one Act. So much I fully grant. But it is one thing to resort to one statute for the purpose of ascertaining the meaning of words and clauses contained in another *in pari materiâ* with it, and a wholly different thing to extend a provision which, by the Act in which it is found, is limited to a particular subject-matter to some other subject-matter which happens to be mentioned in the second Act *in pari materiâ*. I conceive the law to be settled that, to enactments of the latter class, the provisions of the former statute will not apply without express enactment, or, what is equivalent to it, necessary implication. The case referred to by the learned Chief Magistrate in his judgment, *Ward* v. *Stevenson* (1), I conceive to be an authority to this effect; but as doubt was thrown upon that case during the argument, and as the section there was one which created a criminal offence, I shall refer to two civil cases to show that the decision in *Ward* v. *Stevenson* (1) is clearly right, and applicable to the present case.

In *The King* v. *Trustees of Norwich and Watton Road* (2), the question arose upon Turnpike Acts. There it was sought to quash upon *certiorari* an inquisition taken under 3 Geo. 4, c. 126, as to the value of the interests of certain persons in lands required for the purposes of the road. It was objected that *certiorari* had in such a case been taken away by statute. By section 145 of the statute *certiorari* was taken away, but that section was repealed by a subsequent statute, 4 Geo. 4, c. 95, s. 86. By the 87th section, however, of that second Act, it was enacted that "no proceedings to be had or taken in pursuance of *this* Act shall be quashed . . . or removed by *certiorari*." Further, by section 88 of the later Act, "all the powers, matters, and things" contained in the former Act, so far as not expressly altered or repealed by the second Act, "were declared to be in force with respect to the second Act," as fully as if repeated in the body thereof, and "the said recited Act and this Act" were "as to all matters and things whatsoever, except as aforesaid," to be "considered as one Act." Stronger express words of incorporation could not be conceived. It was contended there that as the two Acts were to be considered as one Act, the expression in sect. 87 "in pursuance of *this*

(1) 1 New Sessions Cases, 162. (2) 5 Ad. & E. 563.

Act" included proceedings under the first Act, and that consequently the *certiorari* was, in respect of them, taken away. It was held that it was not. Lord Denman, C.J., in giving judgment, said :—"Then the question is whether the *certiorari* is taken away. By section 87 of 4 Geo. 4, c. 95, 'no proceeding to be had or taken in pursuance of this Act shall be quashed or vacated for want of form, or removed by *certiorari*.' But how is the inquisition a proceeding had in pursuance of 4 Geo. 4, c. 95? It is said to be so, inasmuch as the Act recognises 3 Geo. 4, c. 126, under which the proceedings are had, and that thus, the earlier Act, so far as it is not repealed, is incorporated in the later, and what is done under the earlier may be understood to take place under the sanction of the later. But each Act has a distinct operation on various points; and to bring the proceedings within 4 Geo. 4, c. 95, s. 87, it must be a proceeding expressly pointed out *by that Act*, and not merely taken under another Act recognised by it."

In *Mather* v. *Brown* (1), which has been referred to by the Lord Chancellor, the question involved was the validity of a municipal election. This depended upon the effect of an inaccuracy in a nomination paper of one of the candidates under the Municipal Elections Act of 1875. The objection to the nomination paper was one of misnomer, and a section of a former Municipal Act (2) had enacted that "no misnomer of any person shall hinder the full operation of *this* Act." The 13th section of the Act of 1875, provided that it should, as far as consistent with the tenor thereof, be construed as one with the Act 5 & 6 Wm. 4, c. 76. Lord Coleridge, C.J., in referring to the incorporating section of the second Act, says :—"It does not say that the provision in section 142 of the former Act shall be extended to the later Act, but merely that it shall be construed as one with it. These terms do not seem to me to extend the operation of the amending section in the earlier Act to a document which had no existence then, and therefore could not have been in the contemplation of the Legislature." So here, we may say that the later Act does not extend the operation of the toll clauses of the Act of 1849 to Smithfield Market, which by that Act was declared

(1) 1 C. P. D. 596. (2) 5 & 6 Wm. 4, c. 76, s. 142.

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to be a free market, and in which it was prohibited to levy tolls. Lord Justice (then Mr. Justice) Lindley says:—"I have examined the authorities to see if they would supply any reasoning by which we might get over this objection; but I have found nothing to support the petitioner's view. On the contrary, I have found two cases which look the other way, showing that a mere incorporation by reference of a former Act does not extend all the provisions of the earlier Act to the later Act." He then refers to *Lane* v. *Bennett* (1) and *Davison* v. *Farmer* (2); and says:—"Having regard to the principles upon which these Acts are framed, it is not for us to cure what we may conceive to be defects in them."

I do not think it necessary to refer in detail to the cases mentioned by Lord Justice Lindley, as all the cases of this class, including the two I have referred to, are no more than instances of the application of a well settled rule of construction, that the mere fact of statutes being *in pari materiâ*, or indeed even an express clause that both shall be construed together as one Act, is insufficient to justify the application to a new subject-matter in the second Act of the provisions of the first. Indeed this seems to me to have been the opinion of all the learned Judges who delivered judgment in the Queen's Bench Division.

But then it is said that this is an exceptional case, to which an exceptional rule of interpretation is applicable, and it is upon this that the decision in the Court below was rested. It was said there that in the present case there is something more than the statutes being *in pari materiâ*—something more than that they are impliedly incorporated together. This more intimate connexion, I understand from the arguments here, and from the judgments of the Queen's Bench, is to be found in three circumstances.

The first is that the question is one of procedure only, that the procedure which was established by the Act of 1849 as that applicable to the toll for weighing must, by implication, be deemed to apply to the new toll also.

The second reason, which is substantially the same, although in different words, is that the Act of 1890 amalgamates the new toll with the weighing toll, and that it is unreasonable to hold that

(1) 1 M. & W. 70. (2) 6 Exch. 242.

the weighing toll should be summarily recoverable *per se*, but not when blended with the new toll.

The third ground involves a very far reaching and important question. It is that the policy of the Legislature in providing general Consolidation Acts, requires that the inclusion or exclusion of the Consolidation Act effected by the principal statute shall hold good, not only for that principal statute taken by itself, but for that statute as amended by subsequent Acts, which are for this purpose to be treated as one statute.

I need not say that I have considered each of these reasons with the greatest care; but having given them every consideration, I feel myself unable, by reason of them, to depart from that which I regard as a well settled rule of construction. As to the two first, I am unable to adopt the views of the learned Judges as to the relation between the new toll and the weighing toll. The Act of 1890 does not, in my opinion, amalgamate this toll with the weighing toll. The assertion that it does so assumes that the Act of 1890 operates to extend the subject-matter of the 90th section of the Act of 1849, in the mode in which I have already pointed out section 87 might have been held to have been extended to the new market, provided the tolls were identical. But it will be found that there is no such extension. The nature of the toll, the duties in respect of which it is so levied, and the amount, are all changed. There is an abolition of the old toll on goods brought into this market, and the substitution of a new toll of a different nature. To say that the abolition of a toll created by one Act, and the substitution for it by another Act of a new toll for a different service, the one being for weighing, and the other being for exposure for sale, including weighing, renders the procedure for the recovery of the one toll applicable to the other, is in my opinion to assume the question to be decided. I hold that the effect of the Act of 1890 is that section 90 of the Act of 1849 is not to apply to cases within section 86 of the Act of 1890, and that the nature of the new tolls, and the remedies for their recovery, must be ascertained without reference to the toll created by section 90.

The last reason applies to the incorporation of a general

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Clauses Consolidation Act a rule of interpretation different from that which would have obtained had the principal statute contained in words at length each incorporated clause. I am unable, upon principle, to adopt this rule of construction, though I am fully alive to the convenience which might result from it.

Consolidation Clauses Acts, such as that in question here, have been in operation for upwards of fifty years, during which time innumerable cases must have arisen upon the effect of their incorporation in other Acts, and we have not been referred to any case in which such a rule of construction was laid down. In principle, and without recourse to authority, I am of opinion that the suggested rule cannot be a sound one; because the words in the special Act, incorporating the general Clauses Act, is, that the principal Act is to be construed as if the clauses of the general Act were repeated therein. How then can we give them the effect of incorporating more intimately than if they were repeated therein? In the absence of authority, I refer to the very words of the incorporated Act, 10 & 11 Vict. c. 14:—"This Act shall extend only to such markets or fairs as shall be authorised by any Act of Parliament . . . which shall declare that this Act shall be incorporated therewith, and all the clauses of this Act . . . shall apply to the undertaking authorised *thereby*, so far as the same shall be applicable to such undertaking, and shall, with the clauses of every other Act which shall be incorporated therewith, form part of such Act, and be construed therewith as forming one Act." The word "thereby," in this sentence, means the Act which declares that the Act of 1847 is incorporated with it. The extent of the incorporation is effectively measured in the Act of 1847 by the frequent use of the words "the special Act." As in the present case the clauses relate to tolls to be taken by the undertakers, the undertakers are the persons "authorised by the *special Act*." This expression, "the special Act," is in its terms construed to mean "any Act which shall be hereafter passed authorising the construction or regulation of a market or fair, and with *which* this Act shall be incorporated"; so that the declaration in the particular Act that the general Clauses Act shall be incorporated with it, appears to be an essential condition to such particular Act answering the description of "the

special Act," and unless it answers that description the words of the Act of 1847 are insufficient to effect the incorporation. Hence, I think it follows that the Act of 1890 cannot be comprised within the expression "the special Act," in 10 & 11 Vict. c. 14, and consequently that the last mentioned Acts cannot be deemed to be incorporated in it.

For these reasons I am of opinion that the Chief Magistrate was right in holding that he had not jurisdiction to entertain the complaint; and consequently that the appeal should be allowed.

FITZ GIBBON, L.J.:—

The question in substance is whether the Dublin Corporation Act, 1890, where it authorises tolls in Smithfield Market, is an amending statute, or is a new and self-contained enactment.

The Act opens with recitals, mentioning certain powers vested in the Corporation by the Act of 1849, and the extension and amendment of some of those powers by the Acts of 1861 and 1864: it then recites that "some of the provisions of the above-mentioned Acts require amendment, and it has become expedient to confer on the Corporation further and enlarged powers, for the regulation of buildings and streets, and for dealing with neglected structures, and generally for improving the sanitary condition of the city." Then follow several paragraphs, each reciting some one distinct matter in which the existing powers of the Corporation require amendment, and which is afterwards made the subject of a distinct enactment. The only recital which mentions Smithfield Market contemplates in terms new legislation as to tolls, and not the amendment of existing powers:—"And whereas it is expedient *to authorise the Corporation to take tolls* in respect of cattle, hay, and straw, exposed for sale in Smithfield Market, and to extend its limits." The enactments to which that recital is introductory begin with sect. 86. It opens with the repeal of sect. 81 of the Dublin Improvement Act of 1849, but that repeal is of a very exceptional character, for it is to come into effect only "when and so soon as the market of Smithfield has been paved and completed and is open for the use of the public." The repeal is dependent upon the doing of a thing which might never be done at all,

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which in any event could not be done for a considerable time, and which is stated not to have been done for six or seven years after the Act passed. The important bearing of the curious nature of this repeal upon the question which we have to decide, has been pointed out by the Lord Chancellor. The section proceeds—"it shall *thereupon* be lawful for the Corporation to demand and take such stallage fees and tolls for the standing of cattle, and for carts of hay or straw, exposed for sale in the said market, as they shall from time to time appoint, not exceeding the several stallage fees and tolls specified in the first schedule to this Act." The frame and language of the section suggest that this is an original, independent, and affirmative imposition of stallages and tolls, not changed or amended, but authorised and given for the first time, upon compliance with the prescribed condition. This view gains corroboration from the frame and language of the First Schedule. Its heading is "Tolls for cattle, hay, straw, &c., in Smithfield Market." The paragraph headed "Cattle," which specifies the tolls "for the exposure to sale of horses or other beasts, cattle, or pigs," is a *verbatim* copy of the paragraph which is headed with the words "Cattle" in Schedule D of the Act of 1849, headed "Section 87, *et seq.* Stallages or Rents payable." Schedule D did not apply to Smithfield Market, but only to the markets mentioned in sections 87, *et seq.* Therefore when the same paragraph was introduced *verbatim* into the First Schedule to the Act of 1890, which does apply to Smithfield Market, this is some indication that the Legislature deemed it necessary to repeat the same words, because the second Act was intended to operate, not by way of extension or amendment, but by way of new and distinct legislation. But furthermore, Schedule D prescribed certain "rents per day," "for the space occupied by every cart or other vehicle used by any person for exposing, or in which shall be exposed to sale, any article, commodity, or thing," whereas the new Act entirely departed from this principle of taxation, and, in lieu thereof, imposed, in Smithfield, "for the exposure to sale of hay, straw, grass or litter, sixpence per cartload not exceeding twenty hundred weight and ninepence per cartload exceeding twenty hundred weight, and in either case one halfpenny per hundred weight, in addition, for every hundred weight exposed for sale." Thus, in Smithfield the toll

for hay and straw is new, both in its imposition and in its mode of assessment. The following note is appended to the paragraph which authorises these tolls: "Note.—These tolls in relation to hay, straw, grass or litter, include the charge for weighing at the Corporation weighing houses or bridges." Four sections, and Schedule E, in the Act of 1849 deal with charges for weighing. Sects. 84, 90, and 91, give weighing fees, and they are followed by sect. 92, which is as follows:—"All fees received for . . . weighing of goods at any *weigh-house provided by the Council* shall be duly accounted for . . . to the treasurer of the borough: and such fees, together with all other fees, charges, stallages, or rents which may be paid for or on account of any new markets or slaughter-houses to be built or provided by the Council *under the provisions of this Act* shall be paid to the Treasurer of the borough and form part of the Improvement Fund."

Section 84 enacts "that it shall be lawful for the Lord Mayor to appoint so many persons as he may think necessary for the purpose of weighing all such hay and straw in Smithfield *as shall be brought to them for such purpose;* and that such persons shall hold their appointment during the pleasure of the said Lord Mayor; and such persons may charge such fees as are authorised by this Act to be taken for weighing the same, and specified in Schedule E to this Act annexed." This is the section which gives what is known as "the halfpenny toll." But it is optional with the parties whether they will bring hay and straw at all to the weighmasters appointed by the Lord Mayor, and this "halfpenny toll" is not confined to the weigh-houses provided by the Council. The charge for weighing in Smithfield, authorised by section 84, and specified in Schedule E of the Act of 1849, therefore, is not "the charge for weighing at the Corporation weighing houses," which is mentioned in the Note to the First Schedule to the Act of 1890. The Corporation charge for weighing is that which is given by sections 90 and 91, and prescribed by Schedule D, to the Act of 1849, and which is by section 92 made part of the Improvement Fund.

The conclusion which I draw from the frame and language of the First Schedule to the Act of 1890 is this:—The Corporation is recognised as having weigh-houses, some of which are

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in Smithfield, but all of which are not there; and the Note means no more than that every person who pays the fee given by the Schedule may have his goods weighed by the Corporation without any further charge. It simply says that the fee which is given by the Act of 1890 shall not only be a toll for exposing the hay or straw for sale, but shall also include the charge for weighing.

Therefore, the provisions in the Act of 1890 which impose tolls in Smithfield are, in form and character, original, complete, and independent enactments, and can not be read as amalgamating or amending any previous statute. That being so, we cannot read into the Act of 1890 the provisions of the Markets Clauses Act of 1847, which is not incorporated, nor can we give to the Corporation a special remedy for the summary recovery of these tolls which is only available under the Act of 1847.

The difficulties which arise upon the terms of the Act of 1847 as to the mode of incorporation, and as to treating the Corporation as "undertakers" by implication, afford additional arguments against the decision of the Queen's Bench Division, and I am bound to say that the absence of any reference in the judgments below, to the high and cogent authority of *Ward* v. *Stevenson* (1) renders those judgments of little assistance to us. Mr. Wall's written judgment, and his decision, are founded upon that authority. It appears to me to be, *in principle*, directly in point: upon the language of the statutes in question, it is, in some respects, an *a fortiori* case; it appears to me to have been rightly decided, and the decision of the Queen's Bench Division could not be affirmed without over-ruling it.

WALKER, L.J.:—

The question which we have to consider is whether the summary remedy given for the recovery of tolls by the 38th and 39th sections of the 10 & 11 Vict. c. 14, is applicable to the toll first authorised by the Act of 1890 to be taken in Smithfield Market which till then was a free market.

(1) 1 New Sess. Cases, 162.

If the special jurisdiction is not applied, the Corporation must resort to the ordinary Courts for a remedy.

The question, having regard to the legislation, resolves itself into whether these tolls are authorised to be taken by the Corporation under an Act which authorises the regulation of Smithfield Market by the Corporation, and also by declaration incorporates the Act of 1847.

The first ground on which Mr. Ronan rested the case of the appellant was that the Corporation were not "undertakers" of Smithfield Market—a result which would take away the entire foundation of the jurisdiction. That question is not free from difficulty, but the preamble of the Dublin Improvement Act recites that it was expedient to make better regulation for the public markets, of which I have no doubt Smithfield was one, and the 18th section contains power to make bye-laws for the purposes of the Act and any Act incorporated therewith; and it is very difficult to see how the Lord Mayor as Clerk of the Markets could be undertaker. I am not, therefore, prepared to rest my judgment on that ground, though I do not further express an opinion upon it. But, upon the other ground, I concur with the other members of the Court.

I have no doubt that Smithfield always was the great or a great city market, but I do not think that section 81 of the Act of 1849 is intended as an exempting section from a liability which would otherwise attach under section 86 of same Act. I think it is intended that Smithfield shall be, and remain as heretofore, always excluded from the legislation attaching to a toll paying subject, so far as the owners and the markets are concerned. It remains, so far as regards compulsory Corporation tolls, outside the Act altogether, not by virtue of the Act, but by an older right.

Then comes section 86 of the Act of 1890, which for the first time takes away from Smithfield the character of a free market and gives the Corporation power to take stallage fees and tolls—1, for the standing of cattle the same in amount as for other markets in Schedule II., and 2, for carts of hay and straw exposed for sale, which are altogether new in character—a wholly new subject-matter—and, as a compensating consideration, the charge for

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weighing, which in other cases is paid under section 90 of the Act of 1849, is thrown in, and we have a new standing fee which includes weighing. This last consideration gets rid of the argument founded upon the amalgamation of the charge in Schedule E of that Act. Therefore I think the 86th section is not an amending section, but a new and independent enactment, and that in the absence of incorporation there is nothing to attract the summary remedy given by the 38th and 39th sections of the Act of 1847.

We are dealing with a question of jurisdiction, and if it was meant to be given it has not been so said: at most it is a regrettable *casus omissus*.

The cases which have been referred to are of general application, and are quite as strong as the present.

Solicitor for the appellants: *Rooney*.

Solicitors for the respondents (Dublin Corporation): *Bonass & Rice*.

G. Y. D.

TUOHY *v.* THE GREAT SOUTHERN AND WESTERN RAILWAY CO. (1).

Q. B. Div. 1898. May 16, 17. *Appeal.* June 23.

Railway Company—Carriage of goods—Through booking contract—Carriage over lines belonging to different Companies—Carriage partly by sea—Agreement between different Companies—Freight collected by Company delivering the goods—Liability of Company delivering the goods for injury thereto in the absence of proof that the damage was done on their line—Agency—Authority—Evidence.

Goods were received from a merchant in Manchester by the Lancashire and Yorkshire Railway Company, under a through booking contract, to be carried for the plaintiff, and to be delivered to him in Limerick. The goods were carried from Manchester to Limerick and there delivered to the plaintiff under an arrangement made between the various carrying Companies concerned, by which the freight was divisible amongst them in proportion to the mileage traversed by each, but was to be collected by the defendants from the consignee. The goods were injured in transit, but there was nothing to show on what part of the journey the injury occurred.

On a special case stated by the Lord Chief Baron at the Assizes, on the hearing of an appeal from a dismiss on the merits of a civil bill, brought to recover damages from the defendants for breach of contract to carry from Manchester to Limerick:—

Held, by the Court of Appeal (affirming the decision of the Queen's Bench Division), that there was no evidence that the through booking contract was made by the Lancashire and Yorkshire Railway Company as agents of the defendants, and that therefore, in the absence of proof that the injury was done on the defendants' line, the defendants were not liable.

SPECIAL CASE stated for the opinion of the Queen's Bench Division by the Lord Chief Baron upon the hearing of a Civil Bill Appeal at Limerick Spring Assizes, 1898.

The special case was as follows:—

"1. In the year 1897 goods were delivered to the Lancashire and Yorkshire Railway Company by merchants in Manchester, to be carried for the plaintiff to Limerick, and there delivered to the

(1) Before O'BRIEN, BOYD, and KENNY, JJ.

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said plaintiff upon a through contract for carriage to Limerick, one sum only being charged for the entire journey.

"The goods were carried by the Lancashire and Yorkshire Railway Company to Liverpool, where they were transferred to the City of Dublin Steam Packet Company, who carried the same from Liverpool to Dublin, and there they were transferred to defendants' Company, and carried by them from Dublin to Limerick.

"2. The goods were delivered to the plaintiff at Limerick by the defendants, who collected the freight from the plaintiff for the whole journey.

"3. By an arrangement between the defendants, the Lancashire and Yorkshire Railway, and the City of Dublin Steam Packet Company, the goods were through booked from Manchester to Limerick, and the freight collected by the defendants was divided among the said carrying Companies in proportion to the mileage traversed by each. By the same arrangement the defendants were empowered to receive the entire freight.

"4. The portion of the goods as to which this case is stated were damaged in transit to the extent of £7 10*s.*, but there was no evidence to show on what part of the journey the damage occurred.

"5. The circumstances proved were such that it was admitted that under them the Lancashire and Yorkshire Railway Company if sued would have been liable to the plaintiff for the amount of the damage.

"6. The plaintiff brought a civil bill against the defendant Company on the contract to carry from Manchester to Limerick.

"7. It was contended on his behalf that there was evidence that the contract of the Lancashire and Yorkshire Railway Co. was entered into by them as agents of the defendants, as well as on their own behalf, that an action could have been maintained against the Lancashire and Yorkshire Company and the defendants jointly, for breach of the contract, and consequently that the action would lie against the defendants alone.

"8. I was of opinion that there was evidence that the contract was so entered into by the Lancashire and Yorkshire Company as agents of the defendants, as well as on their own behalf, and that

there was also evidence that that Company had the authority of the defendants to enter into such a contract. I had in my mind the principle, bearing upon the question, which is stated in the judgments of Bramwell, L.J., and Thesiger, L.J., in *Foulkes* v. *The Metropolitan District Railway Company* (1), and by Mellor, J., in *Gill* v. *The Manchester Railway Company* (2), but these cases were not cited.

"9. I was asked by Mr. Murphy, who appeared for the defendants, to state a case for a Divisional Court, and as the question is one of frequent occurrence, and which may gravely affect the power of traders to obtain redress in County Courts at a cheap rate for small injuries to goods through booked to them from England, I thought it right to do so.

"10. If there were any evidence of the contract having been made on behalf of the defendants, as well as of the Lancashire and Yorkshire Company, and of authority in the latter Company to have made the same I should have held as a fact that the contract was so made.

"The questions for the opinion of the Court are:—

"1. Whether there was any evidence that the through contract of carriage was made by the Lancashire and Yorkshire Company, as agents of the defendants as well as on their own behalf?

"2. If so, whether there was any evidence that the Lancashire and Yorkshire Company had the authority of the defendants to make such contract?

"C. PALLES."

A. M. Sullivan, for the plaintiff.

Wm. Q. Murphy (with him *Wright, Q.C.*), for the defendants.

Cur. adv. vult.

(1) 5 C. P. D. 158.

(2) L. R. 8 Q. B. 191.

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May 17.

O'BRIEN, J. :—

This case, which has been stated by the Lord Chief Baron for the opinion of the Court, involves a small sum of money, but raises at the same time a very big question—the contention on the one side, resisted on the other, being that any one of several Railway Companies engaged in a system of through traffic over, not merely different lines, but different parts of the kingdom, and traffic by sea as well, not being the Company by whom the original contract of carriage was made, can, without there being any evidence that the loss complained of happened upon their immediate line, be made liable for loss and damage to goods wherever that loss or damage happened, whether by sea or land, on any part of the route. And it follows, if the plaintiff is right, that the defendant Company may be made liable for injury to, or loss of, goods at sea or in England, and even, as it occurs to me, in the extension of the system of through booking throughout the world, they may be made liable not merely for goods lost or damaged upon ther own line, or lost or damaged in transit between England and Ireland, but may even be made liable for goods lost on the Atlantic between England and America. The case, therefore, becomes one of somewhat unforeseen and vast magnitude, supposing that the view suggested by some Judges—by Lord Bramwell, for instance, whose vigorous good sense must always command attention, and by Lord Justice Thesiger—must be carried out by holding the defendant Company liable in the present case. Now it is assumed, and may be taken as assumed, as the general rule, though subject to numerous exceptions, and depending always upon the terms of the contract, which vary much in each particular case, that an action can be maintained against the Company to whom the goods are originally given—in this case the Lancashire and Yorkshire Railway Company. One of the exceptions is where the terms of the consignment or freight note, or the special conditions of carriage imposed by the particular Company, prevent them from being held liable for damage or loss beyond the limits of their own line, or where they provide, as appears in reality to be the true account of the present case, or may be taken as the true account so far as regards the Great Southern

and Western Railway Company, that the English Company merely agreed to carry over their own line, and for the remainder of the transit assumed the character of agents.

But, in the ordinary case, the contract is usually to carry from one terminus to the other, for an example, from Manchester to London, and is so stated upon the consignment note; and, in that case, the first Company would be the party to be sued; and the action would there rest upon the express contract, wherever the injury happened. Take, then, the case of injury to goods unquestionably happening, not upon the line of the Company by whom the original contract was made, but upon another part of the route, just as if in this case the accident happened upon the Great Southern and Western line. In that instance the Great Southern and Western Railway Company cannot become liable under the original contract at all, but only upon an implied contract that they had received the goods for a sufficient consideration, namely, part of the freight being paid to them, upon their undertaking to carry the goods in safety over their own line. Except in the case of personal injuries, there is really no distinction at all, whether the action is brought against a Railway Company in the form of an action of contract or of tort. For the contract, whether express or implied, covers undoubtedly the same measure of liability, for the Company guarantees safe delivery of the goods. That may be taken to be the ordinary rule, though it does not apply to the case of personal injuries, and does not apply, it has been suggested, to the case of cattle, because they were supposed to walk to their destination, and, therefore, were outside the ordinary rule that makes carriers liable.

This being so, we have next to consider how far we are to carry that rule. The question left to us for our opinion is rather an embarrassing one, though, no doubt, it received much consideration from the Lord Chief Baron, namely, whether the Lancashire and Yorkshire Railway Company were the agents of the Great Southern and Western Company in the contract that they made—this contract, as it is called, of through booking—for that is the way the Lord Chief Baron puts it—or whether, turning it into another form, the Lancashire and Yorkshire Railway Company and authority from the defendant Company to enter into such a

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contract. The way in which his own view of the matter is stated is this—First he states absolutely his own opinion upon the question, and then adds that if there was evidence upon which the conclusion could have been arrived at, he would have been of opinion that such a contract had existed between the Companies. But how is that contract to be made out? By legal argument merely, and more particularly by a construction put upon one passage in a case cited by Mr. Sullivan, by whom the matter has been argued with great ability, and also with great candour, which the Court always expects and is pleased to find. His argument is based upon the "arrangement" which the Chief Baron has found to exist in regard to goods received in Manchester by this English Company, directed to persons in Limerick—an arrangement by which the goods were to be carried, under, I suppose, an ordinary consignment note, to Limerick, being first delivered at Liverpool, then carried by sea to Dublin, and then delivered at Kingsbridge to the defendant Company's manager, by whom they were to be sent on to Limerick.

An arrangement that undoubtedly is. And I should say that, upon the ordinary meaning of the English language, this word "arrangement," in any legal document, or in any legal authority, where it occurs, cannot bear the same meaning as the word contract. In its ordinary daily use the word means an understanding or combination in regard to specific actions or things—here, for instance, that the Companies will so operate that certain goods shall be delivered in Limerick; and our attention has been called by Mr. Wright, Q.C., to the legislative definition of the word where it appears in the Clearing House Act of 1850. The object is merely to save expense to the public; to my mind, the word simply means an understanding that other persons beside the original contracting party were to co-operate in this way for the purpose of bringing the goods to their ultimate destination, and I am at a loss to understand how Mr. Sullivan can make out of that word *arrangement* not merely a contract to carry to Limerick, but a contract with a stipulation or rather a series of stipulations that each of the parties by whom the carriage is to be effected shall be separately liable wherever an injury occurs. It is clear to everyone that this cannot be made

out of *Gill* v. *The Manchester, &c., Railway Co.* (1), for, if ever there was a case which distinctly negatived such a construction, it would be the case I refer to; for there the Great Northern Railway Company received goods for transmission to Sheffield, and found it their convenience to identify themselves with the defendant Company, the Manchester, Sheffield and Lincolnshire Railway Company, and actually had an agreement in writing that for all purposes there should be a complete and full system of interchange of traffic between them, extending even beyond the limits of each Company. The use of the word "limits" shows that the responsibility was intended to extend beyond the lines of the particular Company; and this is further borne out by another phrase, for the agreement stated that the Companies should aid and assist each other as if both concerns were "amalgamated." Besides that, the rolling stock was to be used indifferently by both Companies; and, as we all know, rolling stock is the occasion of many of the injuries that happen to persons and to goods. It is most manifest that the question of liability was there put upon the express terms of that agreement; and how can it be then that a casual reference to such an ordinary word as "arrangement" can be used to create a contract carrying with it all the liabilities, all the multiplied liabilities, that Mr. Sullivan's contention, if successful, must necessarily establish? That case, in my opinion, is no authority upon the present matter.

Another case (2) which has been cited to us presents somewhat more difficulty—a case not very different from the present, save that there the cause of action was damages for personal injuries—where it is stated by Lord Bramwell—and no one has greater respect for his authority than I have—and by Lord Justice Thesiger, that an action would lie against any of the Companies for personal injuries arising out of a tort. No suggestion, however, was there made as to whether this rule was to be applied to the case of contract, and therefore the matter is left with undoubtedly a shadow of doubt resting upon it, because of certain expressions in this case of *Foulkes* v. *The Metropolitan District Railway Company* (2).

(1) L. R. 8 Q. B. 191. (2) 5 C. P. D. 158.

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The other cases that have been cited do not, however, in the least degree assist Mr. Sullivan's argument, and in my opinion furnish the most conclusive grounds upon which the argument against him must be rested. The chief of these were *Cox* v. *Hickman* (1) and *Bristol and Exeter Railway Company* v. *Collins* (2).

In *Cox's Case* (1), an endeavour was made to make two different and separate trustees in a creditor's deed of arrangement—these trustees themselves being creditors and never having acted at all—liable upon bills of exchange accepted by the remaining trustees for the purposes of the trusts expressed in the deed: and the argument was there used that what has been called a participation in profits—which I take leave to say is hardly an appropriate phrase—that these trustees were to receive part of the money raised by the undertaking to which the trust deed referred, made them partners, and liable as if they had been partners with the others. The Court most decisively and emphatically negatived that argument; the distinction is drawn most expressly by one of the judges in that case that participation in profits has no such effect at all, and the question really must depend upon whether the contract was made by the trustees who signed the acceptances on behalf of themselves and the other creditors; and the conclusion to which the Court came was that they had not signed on behalf of the others—that the test was agency, and that the two propositions were not convertible.

The other case—*Collins's Case* (2), appears to me to involve the whole principle upon which the present case must be decided, and it is most distinctly against the plaintiff. In that case goods were received by the Great Western Railway Company to be carried to Torquay, and part of them were lost, destroyed by fire, while passing over the lines of the Bristol and Exeter Railway Company. There was a provision in the Great Western Company's conditions of carriage that the Company should not be liable for loss or damage by fire, and the question was, could Collins make the Bristol and Exeter Railway Company liable, and next, whether the two Companies were partners, merely by reason of the receipt of portion of the freight, so as to be liable for the loss.

(1) 8 H. L. Cas. 268. (2) 7 H. L. Cas. 194.

There the Court most decidedly and emphatically held that the action did not lie against them; that the action, if any, must be brought against the Great Western Railway Company, and that there was no evidence of any contract except with them—that the receipt of portion of the freight did not make the Bristol and Exeter Railway Company co-contractors, and that their concurrence in this continuous or through transit did not make them liable as partners. Whatever the view taken by Lord Bramwell and Lord Justice Thesiger in the case of personal injuries, that is in a case of tort—this authority appears to me most conclusively to determine that the present action is not maintainable.

There is inconvenience, no doubt, in a certain class of cases where small traders in this country may find a difficulty in recovering their demand from an English Company, especially where the injury happens at their own door, upon the line, for instance, of an Irish Company like the Great Southern and Western Railway Company, but it must be remembered that the goods in transit have passed from the hands of the original contracting Company. That Company, if made liable, will, under the arrangements that exist between most or all such Companies, be able to recover the amount of their loss from the Company on whose line the accident occurs; and it is a matter of common observation that these questions are frequently raised between Railway Companies—where, for instance, an English Company is sued by a person whose goods were lost in this country, with the result that inquiry is had to determine where the goods were lost, as can, I believe, be easily ascertained by the system of checks and receipts along the route; and thus the Companies arrange the loss between themselves, the Company on whose lines the loss occurred indemnifying the other.

I am clearly of opinion that no liability attaches to the Great Southern and Western Railway Company upon this contract. They are the agents, no doubt, of the Lancashire and Yorkshire Railway Company, or the Lancashire and Yorkshire Railway Company are their agents to receive goods in London, Manchester, or elsewhere for transmission through their hands and delivery at the Kingsbridge terminus in Dublin. In that sense, no doubt, they are agents. If the Great Southern and Western Railway Com-

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pany receives goods for which the Lancashire and Yorkshire Railway Company has entered into a through carriage contract, and allows them to be damaged or lost, the English Company, if made liable for that loss or damage, can, no doubt, if the accident occurred on the Irish Company's line, call upon the latter to make good what they may have to pay. But that is a contract between the Railway Companies themselves. There is no evidence of any contract involving liability on the part of the defendant Company in this case for anything happening outside their own line, nor any evidence of any authority on the part of the Lancashire and Yorkshire Railway Company to enter into any contract of that nature, and therefore the question submitted to us must be answered in favour of the defendants.

BOYD, J. :—

In this case the contract, as set out in the case submitted to us, is one of a simple contract to carry from Manchester to Limerick. It does not say by what means, or by what railway; and I take it that under this contract the Lancashire and Yorkshire Railway Company might have selected any mode of transit they liked; and, in such contracts as this, I presume that Railway Companies are not in any way bound to select any particular line or route, but may select whatever route they like. It could not be held that in such a case the original contracting Company are agents for the purposes of the contract for all the various Companies over whose lines the goods may be sent.

I take it that what the *arrangement* between the Companies for the carriage of goods really means—and this is also the definite meaning of the word in the Railway Clearing House Act—is that the contracting railway may use the line of any other railway for the carriage of goods to their destination; and this I do not look upon at all as a contract of agency or of partnership, but as an arrangement by which goods may be carried through to their destination. Except for the opinion of Lord Bramwell and Lord Justice Thesiger, and the view which appears to have been taken by the Chief Baron in this case, I should have no doubt upon the matter; but the opinion of such eminent Judges must necessarily cast a doubt upon the correctness of my view. Still, I am bound

to form my own view upon the case, and though not without some doubt in consequence of the expressions in the cases referred to, I have come to the conclusion that the defendants cannot be held liable in this action. The contract was a contract with the English Company, to carry, by what means they liked and by what route they liked, from Manchester, and to deliver in Limerick, certain goods which had been consigned to them for carriage. Any arrangements into which they may have entered for through carriage of goods to different parts of the kingdom are entered into for the convenience of the public; they are not made with a view to any distinct profit to themselves; for, so far as I know, it is immaterial to them over what system the goods happen to be carried. What they say is, We will undertake the carriage of these goods from the time you give them to us until they are delivered wherever you may name, so long as the arrangements existing between the various Companies allow of their delivery there. I therefore do not look upon this as an agreement of agency or partnership; and what the Clearing House has to consider is merely the length of journey over each particular line, and to allocate the freight accordingly. That is a matter, however, between the various Companies; the outside public has no concern with that; their concern is merely with the persons or Company with whom they contract.

Upon these grounds I am of opinion that, upon the facts here stated, this was a contract entered into between the plaintiff and the Lancashire and Yorkshire Railway Company, and that it is they alone who can be sued upon that contract.

KENNY, J.:—

The first question we are required to answer is whether there was any evidence that the through contract of carriage from Manchester to Limerick was made by the Lancashire and Yorkshire Railway Company as agents for the defendants, the Great Southern and Western Railway Company. The Chief Baron has expressed his opinion that there was such evidence, and I gather from the case that, if we concur with him, and also reply to the second question in the affirmative, he will reverse the dismiss below, and give a decree for the plaintiff. But, to my mind, the phrase *contract*

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of carriage in the case is one of ambiguous meaning. It may mean the contractual obligation of each of the three carrying Companies for safe delivery in Limerick, no matter on what part of the journey a loss or injury may occur; or it may mean a liability undertaken by each Company only in respect of carriage on its own system. I apprehend that the Chief Baron uses the phrase in the first of these two senses. On that assumption I am of opinion there is no evidence of such agency.

In the two authorities referred to in the case, there are dicta in the judgments that in certain circumstances of through booking a partnership between the several Railway Companies may be held to exist, or, at least, the conclusion may be drawn that the Company that issues the ticket or consignment-note acts as agent for the others. But in the first of these cases, *Foulkes* v. *The Metropolitan District Railway Company* (1), the action was brought against the intermediate Company on whose system the accident was proved to have happened; and it might well be that agency should be held to exist in the Company that issued the through tickets sufficient in extent to throw a direct liability on the intermediate Company for *its own* acts and defaults, but no further.

In the second case—*Gill* v. *The Manchester Railway Company* (2)—there was an antecedent agreement of a most special character between the Companies, whereby their rolling-stock was to be treated as one stock, and assistance was to be given by each to the other as if the two concerns were amalgamated. Furthermore, the loss occurred on the system of the defendant Company, so that in neither case did the question arise which we have before us here—namely, could the defendants be liable, if, for instance, the damage occurred, as possibly it did, on the sea passage between England and Ireland, before the goods were delivered to the defendant Company's servants. If the three Companies could be held to be partners in the entire enterprise, such a liability might arise; but I cannot see any evidence of such a relation between them, or of any agency to conclude a contract whereby each would be liable not only for its own acts and omissions, but for the acts and omissions of the others.

A. E. R. J.

(1) 5 C. P. D. 158. (2) L. R. 8 Q. B. 186.

The plaintiff appealed to the Court of Appeal (Fitz Gibbon, Walker, and Holmes, L.JJ.).

C. Doyle, for the appellant, cited *Gill* v. *The Manchester, &c., Railway Company* (1); *Foulkes* v. *The Metropolitan District Railway Company* (2); *Bristol and Exeter Railway Company* v. *Collins* (3).

George Wright, Q.C., and *William M. Jellett* (for the respondents), were not called on.

FITZ GIBBON, L.J.:—

I am afraid that we cannot differ from the Queen's Bench Division without disturbing the law as we understand it. The questions asked by the special case are:—1. "Whether there was any evidence that the through contract of carriage was made by the Lancashire and Yorkshire Co., as well as agents for the defendants as on their own behalf"; and 2, "If so, whether there was any evidence that the Lancashire and Yorkshire Co., had the authority of the defendants to make such contracts"?

Before examining what is alleged to be the evidence on which the findings in question may be sustained, I must point out that these questions are submitted on a special case stated by a Judge of Assize on a civil bill appeal, and that they do not arise on the verdict of a jury. In my opinion, it is impossible to apply to questions as to the existence or sufficiency of evidence, when so submitted, the same principle which regulates the action of the Court in dealing with verdicts of juries, without losing the main object which the power of stating these special cases was intended to attain, namely, to obtain for the guidance of the Judges of Assize the aid of the decision of a Divisional Court, and of the Court of Appeal, upon important questions arising on Circuit in County Court cases. The verdict of a jury rests upon the exclusive jurisdiction of that tribunal to decide questions of fact, and the findings must be sustained, unless the Court is able to say that they are not supported by any reasonable amount of evidence, even though the Court would have arrived at the opposite conclusion, if it had had jurisdiction to find the facts. The application

(1) L. R. 8 Q. B. 186. (2) 5 C. P. D. 157. (3) 7 H. L. Cas. 194.

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of that principle to these special cases would lead to contradictory results upon the same amount of evidence, if different Judges of Assize formed opposite conclusions, whereas the object of stating such cases is to secure uniformity of decision. Upon such cases, therefore, I think it the duty of the Court to say what is the conclusion which, in its opinion, ought to be drawn from the evidence stated in the particular case upon which the question has been reserved. In other words, questions submitted in the form adopted here may be answered, and I think that they should be answered, rather with regard to the *preponderance* of the evidence, than according to the mere *existence* of evidence, on one side or the other, or on both sides.

In the present instance, however, even if we were dealing with the verdict of a jury, we are all agreed that we should answer the questions in the negative. We must take the case as stating *all* the facts which are relied on as affording evidence to sustain the affirmative. These facts consist of three circumstances only:— 1. The contract of carriage was a "through contract" from Manchester to Limerick for a "lump freight," made by the Lancashire and Yorkshire Company; 2, the goods were carried by the Lancashire and Yorkshire, the City of Dublin Steam Packet, and the Great Southern and Western Companies successively, each over its own part of the journey, and these Companies divided the freight among themselves, in proportion to the amount of the work separately done by each of them towards earning it; and, 3, the defendant Company, which completed the carriage, was empowered to collect, and did collect, the entire freight at the end of the journey.

These are the only circumstances stated as evidence to make the defendants liable for an injury which is not proved, and which is not to be assumed, to have taken place while the goods were in their possession.

These circumstances afford evidence of an agency on the part of the defendants to carry the goods, and to collect the freight, on behalf of the Lancashire and Yorkshire Company, which made the contract with the plaintiff. That is not the agency for which it is sought to find evidence, but an agency in the Lancashire and Yorkshire Company to contract, on behalf of the defen-

dants, that the defendants, should be liable for the performance of the whole contract of carriage, all through, from Manchester to Limerick. It appears to us that no evidence of such an agency as that can be found upon this case, unless we can hold, in every instance in which there is a "through booking" and a "through rate" at the commencement of the journey, and a collection of the freight upon delivery at the end of it, that the Company making the through contract do so as agents for the carrier who collects the freight from the consignee when he delivers the goods, and can make that carrier liable for the performance of the contract throughout the entire route. If these goods had been delivered to the plaintiff in Limerick by a carter, who drew them from the railway station to the plaintiff's house, and was there paid the freight, being entitled to stop his own cartage out of it, there would be against him exactly the same amount of evidence which exists here against the Great Southern and Western Railway Company, of contractual liability for delay or damage in England or elsewhere. We should even have to go further: the collection of the freight is no more evidence than the sharing of it. On this case, the evidence to make the City of Dublin Steampacket Company liable for a railway accident is the same as that against the defendants. In fact, all the cases in which the contracting Company only has been held liable must have been wrongly decided, if the defendants are liable here.

The Lord Chief Baron states that he had in his mind two cases: *Foulkes* v. *The Metropolitan District Railway Company* (1), and *Gill* v. *The Manchester Railway Company* (2). In the former case, the "arrangement" between the Great Northern Company, which effected the through booking, and the defendant Company was proved, and was the foundation of the decision. It provided for the transmission of goods over all parts of the through route, as well within as beyond the "limits" of each Company, for through rates, and upon through invoices, as if the Companies had been amalgamated—*i.e.* had been either but one Company, or had been partners—and the Court held that this arrangement, if it did not constitute a partnership, at least constituted the Great Northern

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Company the agent of the defendants to make a contract of carriage for the whole journey, upon which the defendants would be liable as co-contractors with the Great Northern Company. The decision rests on the special nature and terms of the arrangement between the Companies concerned. In this case we are told nothing more about the arrangement among the three carrying Companies than the facts which I have already stated.

In *Foulkes* v. *The Metropolitan District Railway Company* (1) the damage was proved to have taken place on the line of the Company which was sued. We say nothing to throw the slightest doubt upon the liability of a carrying Company, under a "through booking," for a breach of contract occurring while the goods are in its possession, in the course of its part of the contract. The facts stated on this case may be quite sufficient evidence of an agency in the Lancashire and Yorkshire to contract on behalf of the Great Southern and Western Company for the carriage of the goods by the latter Company over their own line, and under such a contract (which is often expressly declared to be made in printed conditions) liability may well attach to each or any Company which breaks it. But what we have to decide, and what we do decide, is that the facts stated here afford no evidence that the Lancashire and Yorkshire Co. entered into this contract to carry goods the whole way from Manchester to Limerick, as the agents of the defendants, so as to make the defendants liable as principals for any and every breach of that contract, wherever it might occur along the journey.

The costs of appeal must follow the result; but we have already, in the first of these special cases which came here, expressed our desire to limit expense. They are, after all, only County Court cases, and the costs should be taxed with due regard to that fact. In the present instance, the damage sued for amounts to only £7 10*s*. We directed, in the former case, that the costs of the appeal should be taxed on the principle that they ought not to exceed the costs taxable in the Divisional Court. I say, further, that it must not be assumed that two counsel should always, or even generally, be allowed, or that the deposit of £10 should be taken as the *minimum* measure of the costs. In the

(1) 5 C. P. D. 157.

present case, if the parties so consent, we will measure the costs of appeal at £10, but if they are to be taxed, we will add the same declaration as in the former case.

WALKER, L.J. :—

I concur. There are cases like *Gill* v. *Manchester Railway Company* (1), where, from the nature of the contract between the Companies, each becomes the *alter ego* of the other. But no such contract is proved here. We cannot, merely from the circumstance of the through booking and the arrangement for carrying over their several lines, infer that each became a joint and several contractor for the whole journey.

HOLMES, L.J. :—

To decide this case in favour of the plaintiff would seem to me to be inconsistent with the principle that has been acted on since the *Bristol and Exeter Railway Company* v. *Collins* (2). The parties to the contract must be inferred from three facts—(1) the receipt of the goods in Manchester by the English Company to carry them at a through rate to Limerick; (2) the collection of the freight at Limerick by the defendants; and (3) the division of this sum between the three Companies engaged in the carriage. The natural inference from these facts is, I think, that the receiving Company contracted to carry the entire distance, and the two other Companies only acted as agents for it. If, however, the Judge had drawn the inference that the receiving Company contracted as principal to carry over its own line, and was agent for each of the other Companies to contract for carriage over their portions of the journey, thus having three separate contracts instead of one, I should have held that there was evidence to support this finding; but I can find no evidence on which it is possible to hold that the defendants, either in partnership with the two other Companies or separately, contracted to carry from Manchester to Dublin.

Solicitors for the plaintiff: *P. S. Connolly & Co.*

Solicitors for the defendants: *Barrington & Co.*

G. Y. D.

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CLERK—Of Poor Law Guardians—Remuneration for duties under Labourers Acts
See Sanitary Officer. 1. [358, 363

CLUB — *Licensing law — Intoxicating liquors—"Sale by retail"—Licensing Act*, 1872 (35 & 36 *Vict.* c. 94), *s.* 3.] The "Phœnix" Club was started in 1892, under a president, treasurer, a committee of management, and a manager. The manager (the defendant), who was owner in fee of a house in Dublin, had made a parol letting of certain rooms therein to the club. The club did not prosper financially, and in March, 1894, the members, at their annual meeting, passed a formal resolution, which was entered in the minute book, that the future control of the club be placed in the hands of the manager conditionally that he received the profits as remuneration for his services if he conformed to the requirements of members and paid all expenses, rent, attendance, gas, &c. From this time onward no minutes were kept. The club was carried on by the manager "at his

CLUB—*continued.*
own risk." He received the entrance fees and subscriptions for membership and the profits. The issue of cards of membership and the entire management of the premises was under his control, and he supplied liquor "at the club tariff." On case stated in a prosecution for the sale by him by retail of intoxicating liquor without a licence:—*Held*, that there was no evidence to sustain a finding that this was a *bona fide* club, in which the "members" had any common property or interest in the exciseable articles supplied to them; nor evidence to sustain a finding that there was any tenancy existing between the "manager" and any person or persons on behalf of the club; nor any evidence of the admission as members of the alleged club of the persons to whom the defendant (the "manager") had supplied drink; and that the defendant should have been convicted of the offence. *Graff* v. *Evans* (8 Q. B. Div. 373) distinguished. *Lynam, Appellant; O'Reilly, Respondent* - - - - - Q.B. 48

COLLATERAL RELATIVE—Settlement on marriage—Bankruptcy Act, 1872, s. 52 - - - - - 302, 635
See BANKRUPTCY.

COMMISSIONERS FOR PUBLIC PURPOSES - - - - 83, 271
See HARBOUR COMMISSIONERS.
TOWNSHIP COMMISSIONERS.

COMPANY—Railway.
See RAILWAY COMPANY.

COMPULSORY PURCHASE—*Defence Acts*, 1842 *to* 1873—*Lands Clauses Consolidation Act*, 1845—*Lands compulsorily taken for defence of the realm—Notice to treat, offering gross sum for absolute purchase of lands taken by Secretary for War—Ejectment for non-payment of rent against a tenant from year to year (portion of whose holding had been so compulsorily taken) and all persons concerned—Possession of the Crown—Stay of proceedings as against the Secretary for War—Landlord and Tenant (Ireland) Act*, 1860—*Land Law (Ireland) Act*, 1881, *ss.* 1, 2, 5.] The Secretary of State for War, requiring certain lands for defence purposes, caused the lands to be surveyed, and served, in November, 1894, a notice under the Defence Acts and Lands Clauses Acts, offering to the plaintiff (the owner in fee) and his tenants a gross sum for the absolute purchase of the lands required. He subsequently, under warrant of Justices, was put into possession of said lands, which included a small portion of the holding of the defendant Harkin, a statutory tenant from year to year of the plaintiff. The Secretary of State for War had obtained from Harkin a conveyance of his interest in the portion of his holding so taken, but the compensation for the

COMPULSORY PURCHASE—*continued.*
plaintiff's interest in the lands taken had not been ascertained by a valid arbitration. The plaintiff now brought an action against Harkin "and all parties concerned" for recovery of possession of Harkin's holding for non-payment of rent. The writ having been served on the Secretary for War, this motion was instituted on his behalf, that all proceedings in the action as against him should be stayed:—*Held*, that the offer in the notice of November, 1894, of a gross sum in respect of the absolute purchase of all interests was a sufficient compliance with the statutes; that in any event the Secretary for War was lawfully in possession of portion of the land as trustee for the Crown; and that, inasmuch as ejectment for non-payment of rent does not lie against the Crown, all proceedings in the action should be stayed as against its representative. *Harvey* v. *Harkin* Q. B. 65

CONDITIONS OF SALE—*Vendor and purchaser—Outgoings—County cess—Applotment.*] A condition of sale provided that all outgoings would be discharged by the vendor up to the 1st November preceding the date of the sale:—*Held*, that county cess applotted before this date, but not levied until after the conveyance, was payable by the vendor. *Jackson* v. *Ross* - - - - - Q. B. 296

CONSIDERATION FOR CONTRACT—Bankruptcy Act, 1872, s. 52 302, 635
See BANKRUPTCY.

CONSTABULARY — Officer's pension — Receiver - - - - - - 34
See RECEIVER. 2.

—— Peace officer—Acts committed in preservation of the peace - - - 167, 192
See PEACE OFFICER.

CONSTRUCTION OF STATUTE—Incorporation—Markets and Fairs Clauses Act, 1847—Dublin Corporation Act, 1890 762, 769
See TOLLS.

CONTRACT—Acceptance of office under advertisement - - - - - 255
See SANITARY OFFICER. 2.

—— Consideration for—Marriage of collateral relative - - - 302, 635
See BANKRUPTCY.

—— Through booking — Railway Companies — Injury to goods—Liability 789, 801
See THROUGH CARRIAGE.

CONTRACTOR—Grand Jury—Order for entry upon land—Form of—Notice - 248
See JUSTICES. 1.

—— Grand Jury—Road Contract—Equitable execution - - - - - - 551
See RECEIVER. 1.

CONTRIBUTION—Co-sureties—Non-execution of instrument - - - - - 1
See SURETY.

CONTRIBUTORY NEGLIGENCE—Deposit of goods with innkeeper - - 92
See INNKEEPER.

COSTS—Prosecution under Fishery Acts—Summary jurisdiction - - - 28
See FISHERY ACTS. 1.

—— Summary procedure — One summons complaining of several acts of trespass 694
See JUSTICES. 2.

CROWN—Defence Acts—Acquisition of land—Ejectment—Staying proceedings 65
See COMPULSORY PURCHASE.

—— Occupation by or for purposes of—Exemption from taxation - - - - 656
See RATES.

DEFENCE OF REALM—Land required for—Compulsory purchase—Procedure 65
See COMPULSORY PURCHASE.

DEPOSIT—With innkeeper—Safe custody—Negligence - - - - - - 92
See INNKEEPER.

DISCHARGE OF SURETY—Non-execution of guarantee by intended co-surety 1
See SURETY.

DISTRICT—Defined by rules of Loan Fund Society—Loan to person residing outside [103
See LOAN FUND SOCIETY.

DIVORCE—Nullity of marriage—Domicil—Jurisdiction - - - - - 130
See NULLITY OF MARRIAGE.

—— Trial without jury—New trial motion 300
See NEW TRIAL MOTION.

DOMICIL—Nullity of marriage solemnized outside jurisdiction - - - 130
See NULLITY OF MARRIAGE

DRAINAGE BOARD—Negligent exercise of statutory powers - - - 205
See STATUTORY POWERS.

DUBLIN GAZETTE—Non-publication of average price of corn - - 592, 624
See TITHE RENTCHARGE.

EASEMENT — *Artificial watercourse—Right to the flow of water—Presumption of lost grant between tenants of common landlord—Effect of merger through purchase of the fee by the tenant of the servient tenement—Purchase of Land (Ireland) Act*, 1885 (48 & 49 *Vict. c.* 73, ss. 8, 9—*Land Law (Ireland) Act*, 1896 (59 & 60 *Vict. c.* 47), *s.* 34.] Prior to 1894 (when they purchased their holdings through the Court of the Irish Land Commission) *H.* and *P.* were tenants of adjoining farms on the same estate. In 1861 the predecessor of *H.*, for the better drainage of his holding, constructed a drain through his lands to a neighbouring river, and at the same time a weir was constructed on the course of this drain, and a "carry" or conduit, by which some of the water was led in a different direction along *H.'s* side of the boundary between the two farms to the public road, and thence along that road (which ran through *P.'s* holding), supplying a tank on *P.'s* holding with water, and ultimately finding its way to the river at a point lower down its course. In 1896 *H.* altered the drainage of his lands, and removed this "carry," so that it no longer supplied *P.'s* tank. *P.* entered on *H.'s* land and restored it. *H.* sued for damages. *P.* justified under an alleged parol agreement in 1861, and by prescription. At the trial the jury found a lost grant, but found that there was no flow of water as of right prior to the drainage operations in 1861, and the Judge directed a verdict for the defendant. On new trial motion:—*Held, per* Andrews, Madden, and Boyd, JJ. (*diss.* Kenny, J.), that the drain through *H.'s* farm was merely an artificial drain, made for the improvement of his land, and was essentially not of a permanent character, but open to alteration, improvement, or removal by *H.* at his pleasure; that the enjoyment therefore by *P.* of a supply from such drain must be regarded, not as of right, but as permissive merely; and that *H.* was entitled to a verdict for nominal damages, and to judgment. *Per* Kenny, J. (*diss.*) that having regard to the evidence and to the course of the trial, the drain must be taken to be a permanent though artificial watercourse, and that therefore *H.* was not entitled to succeed on this ground; that twenty years' uninterrupted user having been proved, the jury were justified in finding a lost grant; that the easement so established bound the tenancy of *H.* during its subsistence, and could not be defeated by its voluntary merger in the fee, consequent upon the purchase by him of his holding in 1894 through the Court of the Land Commission; and that accordingly the verdict and judgment ought to stand. *Hanna* v. *Pollock* [Q. B. 532

EJECTMENT.
See ACTION TO RECOVER POSSESSION OF LAND.

EMPLOYER—Liability for acts of servant—Scope of employment - - 352
See LIABILITY OF EMPLOYER.

ENGINEER—Work done for Sanitary Authority—Certificate—Illegal payment - 266
See SURCHARGE. 2.

EQUITABLE EXECUTION - 34, 551
See RECEIVER. 1, 2.

EVIDENCE—Presumption—Grant of easement [532
See EASEMENT.

—— Through booking contract—Damage to goods [789, 801
See THROUGH CARRIAGE.

EXECUTION — *Fi. fa.*—Claim — Expenses of sheriff - - - - - - 703
See FIERI FACIAS.

EXECUTION—*continued.*
—— Garnishee—Judgment obtained in England
See GARNISHEE. [499
—— Receiver - - - - 34, 551
See RECEIVER. 1, 2.
EXEMPTION—Rates—District Lunatic Asylum —Valuation List - - - 656
See RATES.

FAIR RENT—*Agreement and declaration—Filing —Commencement of statutory term—Application to fix judicial rent for second statutory term—Time for application*—44 & 45 *Vict. c.* 49, *s.* 8 (6), (8); *s.* 20, *proviso* (2)—*Questions to be decided on special case.*] By an agreement and declaration, dated 30th March, 1882, the landlord and tenant fixed what was then the fair rent of the holding, agreeing that the first payment in respect of such rent which was payable half-yearly was to be made on the 1st May then next. The said agreement and declaration was lodged with the Clerk of the Peace on the 5th April, 1882, and, at the expiration of three months from that date, was duly filed. On the 2nd July, 1896, the tenant served an originating notice, seeking to fix the fair rent of the holding for the second statutory term:—*Held* (reversing the decision of the Land Commission—[1896] 2 I. R. 671), that the application of the tenant was not premature, as the first statutory term was current pursuant to the terms of the agreement on 1st May, 1882. The Court of Appeal declined to decide whether the first statutory term began to run upon 1st November, 1881, or upon 1st May, 1882, the decision of this question being immaterial to the rights of the parties in this case. *Dunne, Tenant; Knolles and Babington* (*Trustees of Nettles*), *Landlords*
[APP. 308

2. —— *Agreement and declaration — Statutory term—Commencement of—Land Law* (*Ireland*) *Act*, 1881, *section* 8, *sub-section* 6.] By an agreement and declaration, dated 7th January, 1883, and subsequently duly filed, the landlord and tenant of a holding subject to a present tenancy fixed the judicial rent of the holding, and the agreement declared that the judicial rent and term were to commence as from the 1st November, 1881. On the 29th October, 1896, the tenant served an originating notice to fix the fair rent for a second statutory term:—*Held*, by the Court of Appeal, reversing the decision of the Land Commission, that the originating notice was not premature. When a rent is agreed on, under section 8, sub-section 6, of the Land Law (Ireland) Act, 1881, its conversion into a judicial rent is regulated in each case within legal limits by the agreement between the parties. Whenever a rent fixed by agreement acquires the character of a judicial rent, that rent must be conterminous with the statutory term during which it runs. There was nothing illegal in an agreement made by the landlord and tenant in 1883, that the judicial rent

FAIR RENT—*continued.*
and statutory term should begin as from the 1st November, 1881. *Fulton and others, Tenants; Viscount Templetown, Landlord* - APP. 321

3. —— *Fee-farm grant — Land Law* (*Ireland*) *Act*, 1887 — *Redemption of Rent* (*Ireland*) *Act*, 1891.] By indenture of lease, dated 9th March, 1874, in consideration of a fine of £1300, *G.* demised to *B.*, his heirs and assigns, the lands of *D.* for three lives, with a covenant for perpetual renewal, subject to the rent of £100 per annum. On the 23rd September, 1874, *G.* made to *B.* a fee-farm grant of the lands at the same rent. The lands had formerly been let at a higher rent. In 1895 the grantee served notice to redeem the rent; the landlord declined to consent, and the case came before a Sub-Commission to fix a fair rent:—*Held*, on the facts of the case that the Land Commission, in fixing the fair rent, ought not to make a reduction from what would otherwise be a fair rent by reason of the payment of the fine of £1300. *Glenny, Landlord; Bell, Tenant* - - APP. 233

4. —— *Increased letting value—Allowance to the tenant in respect of improvement work—Balance of increased letting value—Right of the landlord thereto —Ulster custom.*] (1) The tenant is entitled to a fair and liberal annual allowance in respect of the present capital value of his improvement work. (2) In ascertaining such capital value and allowance, regard must be had not merely to the expenditure of the tenant in moneys numbered or labour, but to the skill he has employed in developing the latent resources of the soil. (3) If, after a fair and liberal allowance has been made in respect of the tenant's improvement works, any surplus or balance of increased letting value remains, such surplus or balance is the property of the landlord, whether the holding is subject to the Ulster Custom or not *Adams, Tenant; Dunseath, Landlord* (No. 2)
[LAND COM. 709

—— Tenants in common—Partition - 364
See HOLDING.

FEE-FARM GRANT—*Lease for lives renewable for ever—Reservation of right of shooting to grantor, "his heirs and assigns, and his and their attendants, gamekeepers, and servants"—License to a stranger to shoot game on his own account.*] The plaintiff was grantee of lands under a fee-farm grant, by which "free liberty" was reserved to the grantor, "his heirs and assigns, and his and their attendants, gamekeepers and servants, to hunt, fowl, fish, hawk, and set" in the demised premises. On the 2nd July, 1897, *C.* purchased, in the Court of the Land Judge, the grantor's interest in the rent and reservations mentioned in the grant. Before the conveyance was executed to him by the Land Judge, *C.*, by letter, "authorised" the defendant "to shoot game" on the lands during the ensuing season; and the defendant with a party of friends

FEE-FARM GRANT—*continued.*
and attendants entered and shot a hare. On new trial motion:—*Held*, that (even had the Court conveyance been executed) the re-grant of right of shooting did not entitle *C.* to permit a stranger to shoot game in his absence on such stranger's own account. *Reynolds* v. *Moore* - Q. B. 641

—— Redemption of rent - 147, 153, 233
See BONA FIDE OCCUPATION.
FAIR RENT. 3.

FIAT—Judge of Assize - 335, 350, 719
See GRAND JURY.
TRAMWAY.

FIERI FACIAS — *Practice — Sheriff — Interpleader—Expenses of keeping cattle seized—R. S. C. Ir.: Orders LVII., Rr.* 15, 16, 17; *LXV., R.* 90 *—Notice—Admission of claim.*] Under the General Orders LVII., Rules 15–17; LXV., Rule 90, a Judge has discretionary power to allow a sheriff not only costs but expenses up to the time of the admission of a claimant's title to goods seized under a *fi. fa.* Where cattle were seized under a *fi. fa.*, and the sheriff served the execution creditor with notice of claim in Form 28, Appendix B, pursuant to Order LVII., R. 16, but the execution creditor declined to admit the claimant's title to any of the property until the hearing of an interpleader summons, when he admitted the claim as to some of the cattle:—*Held*, that the sheriff was entitled to his expenses against the execution creditor of the keep of the cattle as to which the claim was admitted up to the time of the admission of claimant's title to them, even though he succeeded upon an issue as to the remainder of the cattle. *Brady* v. *Williams* - - - Q. B. 703

FILING—Fair rent agreement—Commencement of statutory term - - - 308
See FAIR RENT. 1.

FINE—Renewable lease—Fair rent - 233
See FAIR RENT. 3.

FISHERY ACTS — *Costs — Prosecutions under the Fishery (Ireland) Acts—Summary jurisdiction —Fishery (Ireland) Acts* (5 & 6 *Vict. c.* 106, s. 94; 13 & 14 *Vict. c.* 88, s. 54; 26 & 27 *Vict. c.* 114, s. 43)—*The Petty Sessions (Ireland) Act*, 1851 (14 & 15 *Vict. c.* 93), *s.* 22—*Statute—Repeal.*] The general provision of the Petty Sessions (Ireland) Act, 1851, sect. 22, enabling Justices to give costs not exceeding 20*s.* does not repeal or limit the wider special powers, conferred by 5 & 6 Vict. c. 106, sect. 94, and 13 & 14 Vict. c. 88, sect. 54, on Justices at Petty Sessions, of awarding to the successful party, in cases of complaints under the Fishery (Ireland) Acts, the costs, charges, and expenses of, and incident to, such complaints and the proceedings therein. *Hosford, Appellant*; *Devine, Respondent* - - - - Q. B. 28

FISHERY ACTS—*continued.*
2. —— *Fishery (Ireland) Act* 1842 (5 & 6 *Vict. c.* 106), *ss.* 103, 106—*Summary jurisdiction—Seizure of nets illegally fished in a river forming the boundary of two counties—Application for order of forfeiture at "the next Petty Sessions Court"—Jurisdiction of Justices of either county to hear the application—"Prosecution of an offence."*] Section 103 of The Fisheries (Ireland) Act, 1842, provides that in case an officer authorised to do so shall seize any nets illegally used, it shall be lawful for him "to retain the same in his custody until the next sitting of the Petty Sessions Court or any adjournment thereof in the district where the same shall be seized, and at such Petty Sessions Court it shall be lawful for the Justices to order the forfeiture of such nets." Section 106 of the same Act provides that, "where any of the offences mentioned in" the Act shall be committed in or upon any lake or river forming the boundary between any two counties or sessional districts, "such offence" may be prosecuted in either of such counties or districts, and may be alleged and stated to have been committed therein. On the night of the 3rd of January, a water bailiff of the Board of Conservators of the Limerick district seized certain nets that were being illegally fished in *M.'s* eel weirs in the river Shannon, and applied on the 18th January to the Justices sitting at Castleconnel Petty Sessions for an order, and obtained an order, for their forfeiture. The river Shannon at this point forms the boundary between the counties Clare and Limerick, and between the Petty Sessions Districts of Doonas (Clare) and and Castleconnell (Limerick). A Court of Petty Sessions sat at Castleconnell on the 4th, and at Doonas on the 15th of January. *M.* having applied to quash the order:—*Held*, that the proceeding to procure a forfeiture was a "prosecution of an offence" within sect. 106; that the words "next sitting of the Petty Sessions Court" meant the next sitting at which it was reasonably practicable to make the application; and that the Justices sitting at Castleconnell on the 18th had jurisdiction to make the order in question. *Held*, further, that it was unnecessary for the Justices to set out on the face of their order that the Court was the Petty Sessions Court next sitting or an adjournment thereof. *Reg.* (*Mackey*) v. *Justices of Co. Limerick* - - - - - Q. B. 135

FIXTURES—*Mortgage—Bills of Sale Acts.*] *C.* took a lease of building ground on which he erected a shop, in which he carried on the trade of a chemist and druggist, having fitted up the premises with suitable trade fixtures, all of which were admittedly capable of being detached without injury to the freehold. After the annexation of the fixtures *C.* mortgaged the premises. In the mortgage the parcels were simply described as "build-

FIXTURES—*continued.*
ing ground," with boundaries, &c., as in the lease, omitting any specific mention of the fixtures:—*Held*, that the fixtures passed to the mortgagees; and further, that the mortgage did not come within the provisions of the Bills of Sale Acts. *In re Calvert* - - - Q.B. (Bankcy.) 501

FORFEITURE OF NET—Illegal fishing—River forming boundary of two counties
See Fishery Acts. 2. [135

GAME—Reservation in fee-farm grant - 641
See Fee-farm Grant.

GARNISHEE—*Practice—Judgment obtained in England—Judgments Extension Act*, 1868.] A garnishee order can be made on foot of a judgment obtained in England, and subsequently extended to Ireland under the Judgments Extension Act, 1868. *Jahnstone* v. *Bucknall* - - - Q.B. 499

GRAND JURY—Quo warranto—*Public office held at will and pleasure—Secretary of Grand Jury—Grand Jury (Ireland) Act* (6 & 7 *Wm.* 4, *c.* 116), *sect.* 45.] *Quo warranto* does not lie in respect of the office of secretary of a Grand Jury in Ireland, such secretary holding office merely at the will and pleasure of the Grand Jury. A resolution of a Grand Jury appointing an officer to their body is not a matter for *fiat* by the Judge of Assize. *Reg.* (*Riall*) v. *Bayly* - - Q.B. 335; App. 350

—— Cess—Conditions of sale - - 296
See Conditions of Sale.

—— Cess—Exemption—District Lunatic Asylum
See Rates. [656

—— Contractor—Repair of roads—Order for entry upon land - - - - - 248
See Justices. 1.

—— Contractor—Repair of roads—Receiver 551
See Receiver. 1.

—— Guaranteed dividend—Tramway—Erroneous certificate - - - - - 719
See Tramway.

GRANT—Reservation out of—Shooting rights
See Fee-farm Grant. [641

GUARANTEE—Baronial - - - 719
See Tramway.

—— Non-execution by one of several co-sureties
See Surety. [1

HARBOUR COMMISSIONERS—*Negligence—Harbour of refuge—Buoy—Defective welding of ring—Omission of adequate test.*] A ship parted from her moorings in Kingstown Harbour during a strong gale, and sustained damage. In the opinion of the Judge who tried the case without a jury and of the Divisional Court the cause of the accident was that the ring to which the ship's cable was attached was defectively welded to the buoy, and broke off without any contributory negligence by the plaintiffs (the shipowners). The buoy had been in use a short time only. It had been purchased by the Harbour Commissioners from a first-class manufacturer, and the defect in the welding could not have been discovered by inspection, or by the ordinary test of hammering. It is not the practice of manufacturers to submit such rings to any test (though flaws are possible in the best workmanship) unless required to do so by the specification. But if so required (which is frequently but not universally done) they are tested by a public department in a well-known and recognised manner, analogous to the testing of cable chains. This precaution had not been taken by the Harbour Commissioners:—*Held*, that the omission to apply such a test was actionable negligence on the part of the Commissioners, rendering them responsible for the result of the accident. *Burrell* v. *Tuohy* - - - Q.B. 271

HOLDING—*Landlord and tenant—Land Acts*, 1881 *and* 1896—Bona fide *occupation—Assignment of portion of holding—Undivided share—Determination of tenancy without resumption of possession—Partition—Originating notice—Amendment.*] *A.* and *B.* were tenants in common in fee of certain lands. *B.* being in occupation of the whole, and holding *A.'s* moiety under a yearly tenancy at a rent, by deed dated the 6th February, 1885, conveyed all his interest in the lands to *C.*—*i.e.* the moiety owned in fee, and his tenant-right in the other moiety. It was agreed between *B.* and *C.* that *C.*, on getting possession, should give up a certain small portion of the lands for the site of a public building, and accordingly, by deed dated the 15th December, 1886, *B.* and *C.*, without the consent of *A.*, conveyed a small plot of the ground to trustees for this purpose. A civil bill decree for possession by *A.* of his undivided moiety, grounded on notice to quit, was obtained by him, but possession was not taken under it, and *C.*, in 1894, served an originating notice to have a fair rent fixed in respect of *A.'s* moiety, and also obtained a decree for partition, which was carried out by deed, the plot conveyed by the deed of the 15th December, 1886, being excluded from the share allotted to *A.* *B.* obtained an order of the Land Commission, amending his originating notice by substituting the divided for the undivided moiety:—*Held* (reversing the decision of the Land Commission), that *C.* was entitled to have a fair rent fixed. *Kennedy, Tenant*; *M'Loughlin, Landlord* - - - App. 364

—— Fair rent.
See Fair Rent.

—— Mortgage—Notice to sell—Disagreement as to price - - - - - 378
See Value of Tenancy. 1.

—— Offer to tenant—Land Act, 1896, s. 40—Advance—Jurisdiction - 391, 416
See Land Law (Ireland) Acts.

HUSBAND AND WIFE—Nullity of marriage —Domicil—Jurisdiction - - 130
See NULLITY OF MARRIAGE.

ILLEGALITY—Payments by Sanitary Authority—Engineer—Certificate - 266
See SURCHARGE. 2.

—— Payments "contrary to law or unfounded"
See SURCHARGE. 1. [511

—— Unlawful fishing in river forming boundary of two counties—Jurisdiction of Justices
See FISHERY ACTS. 2. [135

IMPROVEMENTS — Allowance respecting — Fair rent - - - - 709
See FAIR RENT. 4.

INCREASED LETTING VALUE—Fair rent —Ulster custom - - - 709
See FAIR RENT. 4.

INFANT — Next-of-kin — Guardian — Limited administration - - - - 81
See ADMINISTRATION. 2.

INNKEEPER—*Liability* ultra £30 — *Deposit—Deposit expressly for safe custody—Negligence — Contributory negligence—Non-disclosure of value or nature of goods deposited—Innkeepers Act*, 1863 (26 & 27 *Vict. c.* 41), *s.* 3.] The plaintiff went as a guest to the defendant's inn. While there a parcel (containing jewellery) was sent to him on approval. On receiving the parcel the plaintiff handed it to the manageress at the office or bar, saying, "Keep that for me," but not stating anything as to its value or contents. The parcel was stolen, but not through the wilful act, default, or neglect of the defendants, or any servant in their employ. The usual notices in compliance with the Act were hung up in the inn. The plaintiff, who had paid the jeweller the value of the parcel (£186), having brought this action for damages for its loss:—*Held* (on new trial motion), that the non-disclosure by the plaintiff of the value and contents of the parcel did not amount to contributory negligence on his part; but that the deposit was not a deposit "expressly for safe custody" within the Innkeepers' Act, 1863; and that therefore, in the absence of evidence of any wilful act, default, or neglect on the defendants' part, the plaintiff could not hold them responsible to a greater amount than £30. A guest who deposits an article with an innkeeper cannot, in the absence of default or neglect, hold the innkeeper responsible to a greater amount than £30 for its loss, unless, when making the deposit, he informs the innkeeper, in a reasonable and intelligible manner, that the deposit is for the safe custody of the article. *O'Connor* v. *Grand International Hotel Co., Limited* - - Q. B. 92

INTERPLEADER—Claim—Expenses - 703
See FIERI FACIAS.

JUDGMENT—Recovered in England, and extended to Ireland—Garnishee - 499
See GARNISHEE.

JUDGMENTS EXTENSION ACT—Garnishee
See GARNISHEE. [499

JURISDICTION—Land Commission—Advance —Land Law (Ireland) Act, 1896, s. 40 [391, 416
See LAND LAW (IRELAND) ACTS.

—— Land Commission—Amendment - 364
See HOLDING.

—— Land Commission—Fixing true value of tenancy - - - - - - 378
See VALUE OF TENANCY. 1.

—— Queen's Bench Division — Marriage solemnized in India—Irish domicil — Declaration of nullity - - - 130
See NULLITY OF MARRIAGE.

JURY—Quarter Sessions—60 & 61 Vict. c. 20—Expenses—Presentment - - 508
See SUB-SHERIFF.

JUSTICES—*Summary jurisdiction—Procedure—Order of Justice authorizing road contractor to enter upon lands—Notice of application to owner or occupier—Form of order—Limit as to time—Grand Jury (Ireland) Act*, 1836 (6 & 7 *Wm.* 4, *c.* 116), *s.* 162.] An order of a Justice authorizing a contractor with the Grand Jury to enter on lands for the purpose of procuring materials for the repair of a road should limit such right of entry to a definite period. *Reg.* (*Bentham*) v. *Justices of Dublin* (14 L. R. Ir. 443) followed. *Per* Johnson and Gibson, JJ., *diss.* Murphy, J.:—An order of this nature reciting the presentment under which the contract was made, and authorizing the entry "for the period in said presentment mentioned," is void. An order of this nature should only be made on summons or notice, but notice given to a person in occupation of the land under a grazing letting *held* sufficient. *Reg.* (*Guinness*) v. *Justices of Co. Louth* - Q. B. 248

2. —— *Summary jurisdiction — Procedure — Summons—Order—Costs—Several orders made upon one summons*—Certiorari — *Summary Jurisdiction (Ireland) Act* (14 & 15 *Vict. c.* 92), *ss.* 20, 24—*Petty Sessions (Ireland) Act* (14 & 15 *Vict. c.* 93), *ss.* 20 (1), 22 (9).] The Irish Land Commission summoned Daly under 14 & 15 Vict. c. 92, s. 20, for trespass by goats, alleging in the one summons eight trespasses on several days. The Justices imposed fines in respect of each trespass, and made up eight distinct orders, with 5*s.* costs in each. On *certiorari*:—*Held*, by Sir P. O'Brien, L. C. J., and Gibson, J. (*diss.* Murphy, J.), that these orders were bad; that the trespasses alleged in the one summons were one case; that there should therefore have been one order thereon, with costs not exceeding 20*s.*; and that accordingly, though the orders were on their face regular, the Court had jurisdiction, notwithstanding section 24 of the Summary Jurisdiction (Ireland) Act, 1851, to

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remove and quash them on *certiorari*, inasmuch as they were filled up misleadingly. *Reg.* (*Daly*) v. *Justices of Co. Cork* - - - Q. B. 694
—— Fishery Acts—Summary jurisdiction—Costs of prosecution - - - - - 28
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—— Fishery Acts—Summary jurisdiction—Illegal fishing in river forming boundary of two counties - - - - - - 135
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—— Licensing Acts—Alteration in premises—Transfer - - - - - - 652
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—— Licensing Acts—Club—Evidence - 48
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—— Loan Fund Society—Recovery of money lent—Authorized advances - - 103
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—— Tithe rentcharge—Variation—Non publication of average price of corn in *Dublin Gazette—Certiorari* - - 592, 624
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LAND COMMISSION—Jurisdiction 364, 378,
See HOLDING. [391, 416
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VALUE OF TENANCY. 1.
LAND LAW (IRELAND) ACTS—*Land Purchase Acts—Land Law* (*Ireland*) *Act*, 1896, *s.* 40—*Jurisdiction of Land Judge—Jurisdiction of Land Commission—Guarantee deposit—Land stock—Report of two Land Commissioners—Price at which sale should be made.*] The Land Commission, at the request of the Land Judge, pursuant to sect. 40, sub-section (1), of the Land Law (Ireland) Act, 1896, caused an estate to be inspected and a report to be made by two Commissioners respecting, amongst other matters, the price at which the sale of their holdings could properly be made to the tenants on the estate under the Land Purchase Acts. Having considered the report, and having given all parties an opportunity of being heard, the Land Judge directed offers to be made to the tenants to sell them their holdings at prices in Guaranteed Land Stock higher in most cases than those mentioned in the report, and these offers were accepted by the tenants. When the applications for the advance of the amounts of the increased prices in Guaranteed Land Stock came before the Land Purchase Commissioner, he in some cases, not being satisfied as to the sufficiency of the security, refused the applications:—*Held*, by Bewley, J., and on appeal by the Court of Appeal (*diss.* Porter, M. R., and Fitz Gibbon and Holmes, L. JJ.), affirming the decision of Bewley, J., that the Land Commission, not being satisfied as to the sufficiency of the security, was not bound to make an advance to the tenants in Guaranteed Land Stock to the amount of the prices so fixed by the Land Judge. *In re Harkness' Estate* (No. 2) [LAND COM. 391; APP. 416
—— *Bona fide* occupation - - 147, 153
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—— Commencement of statutory term 308, 321
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—— Easement—Purchase of holding by tenant 532
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—— Fair rent—Increased letting value—Improvements - - - - - - 709
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—— Fair rent—Payment of fine - - 233
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—— Notice to sell tenancy—Fixing true value [378, 586, 592
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—— Originating notice—Amendment - 364
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—— Redemption—Appropriation of payment 761
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—— Undivided share of holding—Partition 364
See HOLDING.
LANDLORD AND TENANT—Action to recover possession of land—Nonpayment of rent—Compulsory purchase of part of holding by Secretary of State for War Department—Staying proceedings 65
See COMPULSORY PURCHASE.
—— Easement—Dominant and servient tenement held under same landlord—Purchase of fee by tenant of servient tenement 532
See EASEMENT.
—— Land Law (Ireland) Acts.
See LAND LAW (IRELAND) ACTS.
—— Lease.
See LEASE.
—— Redemption of rent—*Bona fide* occupation [147, 153
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—— Redemption of rent—Fair rent—Fine 233
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LEASE—Fine—Redemption of rent—Fair rent
See FAIR RENT. 3. [233
—— Reservation of shooting—License to stranger
See FEE-FARM GRANT. [641
LIABILITY OF EMPLOYER—*Master and servant—Railway Company—Act of servant ordinarily within the scope of his authority, but done, for the purpose of his employer, under circumstances that rendered it unjustifiable.*] The plaintiff, a

LIABILITY OF EMPLOYER—*continued.*
passenger on the defendant Company's line, alighted at the station next before that for which his ticket was issued. He refused to give up his ticket, alleging that he was breaking his journey, but offered his name and address. The station-master thereupon locked the only door leading out of the station, and detained the plaintiff a considerable time, until his ticket was given up. On new trial motion in an action against the Company for false imprisonment, *held*, that the locking of the door being an act of a class ordinarily within the scope of the station-master's authority, and having been done, under circumstances that rendered it unjustifiable, in the course of the servant's employment, and for the purposes of the Railway Company, his employers, the Company was responsible. *Farry* v. *Marshall; Farry* v. *Great Northern Railway Company* - - - - - Q. B. 352

LICENSE—To stranger—Reservation in grant
See FEE-FARM GRANT. [641

LICENSING ACTS — *Spirit-grocer's licence — Certificate of Justices—"Person dealing in or selling tea, cocoa nuts, chocolate, or pepper"—Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *ss.* 81, 82—*Licensing Act*, 1874 (37 & 38 *Vict. c.* 69), *ss.* 9, 10.] It is not competent for Justices at Petty Sessions to refuse to grant a certificate for a spirit grocer's licence on the ground that the applicant was not, at the date of the application, a person "dealing in or selling tea, cocoa nuts, chocolate, or pepper," it being for the Excise to ascertain the existence of this qualification when issuing the licence. The decision on this point in *Reg.* (*Gilbey*) v. *Justices of Fermanagh* ([1897] 2 Ir. R. 559) reconsidered and affirmed. *Reg.* (*Donohoe*) v. *Justices of Armagh* [Q. B. 129

2. —— *Transfer—"Licensed premises," alterations in.*] *C.* obtained an assignment of certain licensed premises and the licence attached thereto, and applied for a transfer to him of the licence. The assignment contained a reservation, in favour of the former owner and licensee, of the room at present occupied by him. The Justices refused to grant the certificate on the ground that "the whole of the licensed premises" had not been assigned to the applicant:—*Held*, that the true test was not this, but whether the licensed premises, as assigned were substantially the same as before. *Reg.* (*Callaghan*) v. *Justices of Co. Donegal* - Q. B. 652

—— Club—Sale of intoxicating liquors - 48
See CLUB.

LIGHT RAILWAY — Baronial guarantee—Certificate of arbitrators—Excess of jurisdiction - - - - - 719
See TRAMWAY.

—— Resolution approving of construction—Traverse - - - - - - 83
See TOWNSHIP COMMISSIONERS.

LIMITED ADMINISTRATION—Guardian of infant next-of-kin - - - 81
See ADMINISTRATION. 2.

LOAN FUND SOCIETY—*Loan Fund Act* (6 & 7 *Vict. c.* 91)—*Statutory loan by Society—Loan to person not residing within the district defined by the rules of the Society—Recovery of amount advanced—Jurisdiction of Justices — Statutory promissory note—Renewal of outstanding note.*] The Enniskillen Loan Fund Society was duly formed under the Loan Fund Act, 6 & 7 Vict. c. 91, which provides that, "subject to the restrictions and regulations" therein contained, Loan Fund Societies might be formed in Ireland "in any district or place in which it shall be proved to the satisfaction of the Loan Fund Board that such society is required," and may raise a fund "for the purpose of granting loans to the industrious classes resident therein;" and that it should be lawful for such society from time to time to make, subject to the restrictions contained in the Act, "rules for the better government and guidance of the same, and for defining the district . . . within which the operations of the society ought to be conducted;" such rules, when duly approved of, to be binding on the society and borrowers; no loans to be made on personal security to any one individual at any one time exceeding the sum of £10; no second or other loan to be made to the same individual until the previous loan be paid off; and every promissory note for the repayment of a loan to be on a certain printed form (to be supplied by the Board) to be made payable to the secretary or treasurer for the time being, and not to be chargeable with any stamp duty. In case of default in repayment it is provided by section 30 that it shall be lawful for Justices at Petty Sessions to make an order for payment. The defendant, a person not residing within the district defined by the society's rules, was sued at Petty Sessions on foot of a promissory note for £10 (drawn on the statutory form), signed by him and two sureties. The note was the last of a series of renewals of an original note made several years previously. On Case Stated:—*Held* (*per* Sir P. O'Brien, L.C.J., Holmes and Gibson, JJ., *diss.* O'Brien, J.), that the loan, being made to a person not residing within the defined district, was unauthorized as a statutory loan, and invalid; that the special summary jurisdiction, conferred by sect. 30 on Justices at Petty Sessions, was restricted to authorized advances, and that therefore the complaint should have been dismissed without prejudice. *Per* O'Brien, J. (*diss.*), that the loan, though unauthorized, was nevertheless unrecoverable before Justices under the provisions of sect. 30. *Quære*, is such an action recoverable by action? *Quære*, is a renewal of such a promissory note authorized or legal? *Treasurer of Enniskillen Loan Fund Society* v. *Green* . . . Q.B. 103

LOCAL GOVERNMENT BOARD—Allowance by auditor—*Certiorari* - 683
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—— Orders as to out-door relief - - 57
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—— Surcharge by auditor—Payments "contrary to law or unfounded" - - 511
See SURCHARGE. 1.
—— Surcharge by auditor—Person making or authorizing the making of an illegal payment—Engineer—Certificate - 266
See SURCHARGE. 2.
LUNATIC—District Asylum—Exemption from rating - - - - - - 656
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MARKET—Tolls — Recovery—Summary jurisdiction - - - - - 762, 769
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MARRIAGE—Nullity - - - 130
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—— Of holding—Notice to sell—Disagreement as to price—Value of tenancy - 378
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NAVIGATION—Tidal river—Standard of care and skill *quoad* trespasser - - 556
See NEGLIGENCE.

NEGLIGENCE — *Navigation — Tidal river — Oyster beds laid down by trespasser—Grounding of ship without negligence—Standard of care and skill required in the avoidance of damage to the property of a trespasser.*] The Newry Navigation Company were a corporation established by statute for carrying on the navigation in the Newry River, and through Carlingford Lough to the sea. The river from Newry to Warrenpoint, where it enters the Lough, is about seven miles long, and the bed had been deepened by dredging for the purposes of navigation by the Company. The plaintiff had laid down some oyster beds in the Newry River on the southern shore. In 1889 and 1894 he took portion of the fore-shore from the tenants of lands abutting on the river, but he had no title to any part of the bed and soil of the river, and in the opinion of the Court of Appeal, on the evidence, he was not even lawfully in possession of the site of

NEGLIGENCE—*continued.*

the oyster beds. He twice applied to the Fishery Inspectors for a license to lay down oysters, but his applications were refused. A correspondence ensued between him and the Navigation Company, for the purpose of obtaining the lease of the beds from them. The Company refused to grant a lease, and more than once warned him to take away his oysters, as they were about to commence dredging operations. On the 10th December, 1895, the "Rostrevor," a screw steamer the property of the defendants, while proceeding down the Newry River, accidentally went ashore at the place where the plaintiff had laid down his oysters, and her bow stuck in the ruins of an old beacon. It was two hours after high water, and she lay there till the return of the high water. Shortly before the return of high water the captain got her off, and in doing so he used the propeller as well as a hawser attached to a post on the opposite shore. The captain deposed that he was ignorant of the existence of the oyster-beds, but it was proved by some witnesses that at low water, portion of the vessel was high and dry, and the oysters were visible all round her. The plaintiff's oysters were damaged very considerably by the vessel in taking the ground, and still more so in getting her off:—*Held*, that there being no sufficient evidence of recklessness or gross negligence on the part of the captain, the plaintiff was not entitled to recover damages for the injuries to the oysters. The standard of care and caution by the owner of a ship lawfully using the water way of a navigable river towards a trespasser thereon considered, and the analogous authorities upon negligence discussed. *Per* Lord Ashbourne, C. The captain was entitled to get off his ship, by any reasonable exercise of seamanship that his own reasonable knowledge might suggest. He was bound not to be reckless or careless, so as to injure the oysters; but within that he was entitled to do anything that he reasonably could, to effect what was necessarily his primary object and purpose, viz. to get away his ship safe, exercising his skill and judgment *bona fide*, and fairly avoiding, as far as he could, any reckless, negligent, or careless action that might be detrimental or dangerous to the oysters. *Per* Fitz Gibbon, L.J. The captain was entitled to use all reasonable means, according to the best of his judgment, to take his ship out of the position in which she lay; and though he was bound to the plaintiff, in using those means, not to recklessly or wilfully injure the oysters, his first duty and right was to do everything which seemed reasonable to get his own ship off. *Petrie* v. *Owners of ss. Rostrevor* - - - - - APP. 556

—— Drainage Board—Injury caused by exercise of statutory powers - - - 205
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—— Harbour Commissioners—Defective buoy—Insufficient testing - - - 271
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—— Innkeeper—Deposit - - - - 92
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NEW TRIAL MOTION—*Practice—Probate or matrimonial matter—Trial before a Judge without a jury—Appeal—Judicature (Ireland) Act*, 1897 (60 & 61 *Vict. c.* 66)—*R. S. C. (Ir.), Order LXX., Rule* 46; *Order XXXIX., Rule* 1.] The existing Rules and Orders of the late Probate and Matrimonial Division remaining in full force until altered, notwithstanding the fusion of that Court with the Queen's Bench Division (see the Judicature (Ireland) Act, 1897, section 5)—an application for a rehearing, or to change verdict and judgment, in a probate or matrimonial cause tried without a jury, should be by appeal to the Court of Appeal. *Gunn* v. *Gunn* [Q. B. (MAT.) 300

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NOTICE—Application by Grand Jury contractor for order to enter upon land - 248
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—— Intention to sell tenancy—Disagreement as to price—Mortgage—True value 378
See VALUE OF TENANCY. 1.
—— Intention to sell tenancy—Offer to purchase "without prejudice"—Disagreement
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NOTICE TO TREAT—Lands required for defence of realm - - - - 65
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NULLITY OF MARRIAGE—*Petition for declaration of nullity of marriage celebrated in India—Respondent domiciled and resident in Ireland—Jurisdiction.*] *A.*, a domiciled Irishman, intermarried in Ireland with *B.*, and afterwards, during *B.'s* lifetime, went through the ceremony of marriage, according to the rites of the Church of England, with *C.*, at Kashmir, in India. *C.* presented a petition to have the marriage in India declared null and void, and the citation was served upon *A.* at his residence in Dublin. The petition contained no allegation relating to the domicil of the petitioner then resident in England. The respondent did not appear. *Held*, that the respondent's domicil and residence in Ireland gave the Court jurisdiction, and (the facts having been proved) the marriage in India was accordingly declared null and void. *Johnson* (*falsely called Cooke*) v. *Cooke* Q. B. (MAT.) 130

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—— Land Law (Ireland) Acts 147, 153, 364
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ORDER OF JUSTICES—Grand Jury contractor—Entry upon land - - 248
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ORDERS, GENERAL—1891, 19th Jan. (Supreme Court), XXXIX., R. 1 - 300
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—— LXV., R. 90 - - - - - 703
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—— LXX., R. 46 - - - - - 300
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—— 1897, 2nd Jan. (Land Commission), 98, 99 [586, 592
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ORIGINATING NOTICE—Land Commission—Amendment - - - - 364
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OUTDOOR RELIEF—Payment without previous order—Noncompliance with General Orders of Local Government Board 57
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OYSTER BEDS—Laid down by trespasser—Navigation—Tidal river - - 556
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PARTITION—Holding—Fair rent - 364
See HOLDING.

PAYMENT—Contrary to law or unfounded
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—— Illegality—Person authorizing - 266
See SURCHARGE. 2.
—— Rent—Appropriation - - - 761
See REDEMPTION OF TENANCY.

PEACE OFFICER—*Duty to preserve the peace—Acts committed in the execution of such duty.*] In 1891 the parish of Killannin, of which the plaintiff was then priest, was transferred from the Roman Catholic archdiocese of Tuam to the diocese of Galway. The plaintiff who disputed the right of his superiors to make such transfer without his consent, appealed to Rome; and went to Rome, and there remained from 1891 to 1894 prosecuting his appeal. He returned unsuccessful to Killannin in January, 1894, and found that in the meanwhile another clergyman (*C.*) had been appointed parish priest in his stead by the Bishop of Galway, and had been performing the duties of that office. On Saturday, the 9th February, the plaintiff, with a large body of parishioners, his sympathisers, took and held possession of the parish chapel. On the

PEACE OFFICER—*continued.*
following (Sunday) morning the defendant, a district inspector of constabulary, proceeded, in obedience to instructions from headquarters, to the chapel, and took command of a body of constables, who had been sent there at an earlier hour. Shortly after his arrival *C.*, with another large body of the parishioners, appeared on the scene. *C.* stated that he was the parish priest, and asked the defendant to break open the chapel door, or to assist him in gaining admission. The defendant refused to do so, and awaited events. *C.'s* party opened the door with a sledge-hammer, and *C.* and some of his followers entered the sacristy. The defendant and some constables entered after them. An excited altercation ensued between the plaintiff and *C.*, the latter demanding to pass from the sacristy into the chapel, while the plaintiff opposed his right to do so. In the end the plaintiff pushed *C.* roughly back; a rush was immediately made at the plaintiff, and a general riot would have resulted, had not the defendant (who till then had remained a passive spectator) interfered, with the object of preventing the impending riot, and removed the plaintiff from the chapel precincts. In an action for assault and trespass, the jury found that such removal was reasonable and necessary to prevent a breach of the peace:—*Held*, on new trial motion, by the Queen's Bench Division, and, on appeal, by the Court of Appeal, that, even assuming the plaintiff to have been legally in possession of the chapel, the defendant had done nothing exceeding his duty as a peace officer, that the finding of the jury was reasonable, and that the action was untenable. *Coyne* v. *Tweedy* - - Q. B. 167; App. 192

PENSION—Constabulary officer—Receiver 34
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POOR LAW—*Audit—Allowance* — Certiorari — *Poor Law (Ireland) Act*, 1838 (1 & 2 *Vict. c.* 56), *ss.* 94, 114—*Local Government Board (Ireland) Act*, 1871 (34 & 35 *Vict. c.* 109), *s.* 12—*Resolution of Guardians of the Poor applotting rate upon particular electoral division*—"*Order*" *of Guardians* (1 & 2 *Vict. c.* 56), ss. 114, 115.] The Guardians of the Granard Union having, by resolution, charged against a particular electoral division certain legal expenses which (it may be here assumed) should have been borne by the Union at large, and the auditor having allowed the charge:—*Held* (following *Reg.* (*Porter*) v. *Guardians Omagh Union*, 26 L. R. Ir. 619), that *certiorari* did not lie in respect of such allowance. *Per* Gibson, J.: For the purpose of quashing an allowance, there is no right at common law to the writ. *Quære*: Was such resolution an "order" of the Guardians within 1 & 2 Vict. c. 56, s. 114? *Reg.* (*O'Ferrall*) v. *Sheehan* [Q. B. 683

2. —— *Outdoor relief — Relieving officer — Payments made without previous order*—"*Nature and duration of relief given*"—*Auditor—Surcharge*—1 & 2 *Vict. c.* 56, *ss.* 94, 95—10 *Vict. c.* 31, *ss.* 27, 28—*General Orders of the Local Government Board*, 1853 *and* 1882.] An order of Poor Law Guardians giving outdoor relief must comply with the rules and regulations made pursuant to the Poor Law Acts, and, in particular, must state as well the duration as the nature of the relief given. Where a valid order has not previously been given, payments by a relieving officer in outdoor relief (save provisional relief afforded in cases of sudden or urgent necessity) are unauthorised and illegal, and cannot be legally sanctioned by any subsequent order. *Reg.* (*O'Mahony*) v. *Ellis* - Q. B. 57

—— Sanitary Officer—Remuneration [255, 358, 363
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PRACTICE—Administration—Grant of 79, 81
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—— *Certiorari*—Audit of poor law accounts 683
See POOR LAW. 1.

—— *Certiorari*—Invalid order of Justices for variation of tithe rentcharge - 592, 624
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—— Sheriff—Claim to goods seized—Expenses of keeping cattle—Discretionary power to allow - - - - - - 703
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—— Staying proceedings—Action against Secretary of State as representing the Crown 65
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—— Traverse—Resolution of Township Commissioners approving of light railway—Tramways Acts, 1860, s. 38; 1861, s. 5 83
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—— Guaranteed dividend—Erroneous certificate
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PUBLIC HEALTH ACT, 1878—Sanitary prosecutions — Remuneration of sanitary officer—Advertisement—Special contract
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—— Easement - - - - - - 532
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—— Variation of tithe rentcharge—Non-publication of average price of corn—*Certiorari*
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RAILWAY—Constructed under provisions of Tramways Acts - - - 83, 719
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RAILWAY COMPANY—Servant—Scope of employment - - - - 352
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—— Through booking—Damage to goods—Agency —Liability - - - 789, 801
See THROUGH CARRIAGE.

RATES—*Taxation—Exemption—Crown property —District Lunatic Asylum (Ireland)—Board of Control—County cess—Poor rate—Valuation Act*, 1854 (17 & 18 *Vict. c.* 8, *s.* 2.] District Lunatic Asylums in Ireland under the superintendence of the Board of Control are Crown property and exempt from taxation. In order that premises should be exempt from taxation as being used for public or charitable purposes it is necessary that they should be in fact distinguished in the Valuation Lists as so used. *Harte* v. *Holmes* - Q. B. 656

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—— Applotment—Resolution of Poor Law Guardians—Allowance by Local Government Board auditor—*Certiorari* - 683
See POOR LAW. 1.

RECEIVER — *Practice — Equitable execution — Money payable under Grand Jury contract—Maintenance of public road.*] A receiver by way of equitable execution cannot be appointed over the amount payable on foot of a Grand Jury contract for maintaining a public road until the work, the subject-matter of the said contract, has been duly executed, according to the terms of the contract, up to the date of the assizes. *In re Johnson* Q. B. 551

2. —— *Practice—Equitable execution—Receiver —Pension—Royal Irish Constabulary.*] The Court has power to appoint a receiver over the pension of a retired officer of the Royal Irish Constabulary. The proper form of such an order settled. *Manning* v. *Mullins* - - - - - - APP. 34

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—— Fair rent—Fine - - - - - 233
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REDEMPTION OF TENANCY — *Landlord and Tenant—Land Law (Ir.) Act*, 1896 (59 & 60 *Vict. c.* 47), *s.* 16.] Where the tenant of a holding to which the Land Law Acts apply is ejected for non-payment of rent, more than two years' rent being in arrear, and pays, in order to be restored to possession, two years' rent, as provided by the Land Law (Ireland) Act, 1896, sect. 16, the landlord is at liberty to appropriate such payment to the earliest portion of the tenant's indebtedness. *Eyre* v. *Coen* - - - - - - Q. B. 761

RENT—Payment—Appropriation - - 761
See REDEMPTION OF TENANCY.
—— Redemption of—54 & 55 Vict. c. 57, ss. 1, 3 [147, 153, 233
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REPORT—Irish Land Commission—Sales under Land Act, 1896, s. 40 - 391, 416
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—— Purchase by tenant—Land Law Act, 1896, s. 40—Jurisdiction, Land Commission [391, 416
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—— Tenancy—Fixing true value—Disagreement as to price - - 378, 586, 592
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SANITARY OFFICER—*Labourers (Ireland) Act*, 1886 (49 & 50 *Vict. c.* 59), *sect.* 8, *sub-sect.* 2—*Clerk of Guardians of Poor—Remuneration for duties performed under the Labourers (Ireland) Acts—Action for work and labour done.*] Sect. 8, sub-sect. 2 of the Labourers (Ireland) Act, 1886, provides that an officer of a sanitary authority shall be entitled to be remunerated for any duty performed by him under the Act according to a scale to be fixed by the sanitary authority, with the approval of the Local Government Board. The plaintiff was clerk of the Athy Board of Guardians, an urban sanitary authority, and acted as their sanitary officer in relation to the Act generally, and in particular in relation to a scheme for building labourers' cottages. By a resolution of May, 1893, the guardians had agreed to give him "an adequate allowance" for his services under the Labourers (Ireland) Acts. The plaintiff resigned office in 1896, and sent in a claim for £452 for his services under these Acts. The guardians, by resolution, fixed his remuneration at £28 15*s.* The plaintiff refused to accept the amount, and brought an action for £362, on the special contract contained in the resolution of May, 1893. At the trial leave was given to amend the claim by inserting a count for work and labour done. On new trial motion:—*Held*, by the Queen's Bench Division, and, on appeal, by the Court of Appeal, that the only remuneration (beyond his ordinary salary as clerk of the guardians) to which the plaintiff could be entitled as sanitary officer was the amount which the guardians might fix; and that the action did not lie. *M'Hugh* v. *Guardians of Athy Union* Q. B. 358; APP. 363

2. —— *Public Health (Ireland) Act*, 1878 (41 & 42 *Vict. c.* 52), *ss.* 11, 258—*Sanitary authority—Remuneration of medical officer—Attendance at sanitary prosecutions.*] The medical officer of health of a dispensary district is entitled under the Public Health (Ireland), 1878, to remuneration from the sanitary authority for attending at a

SANITARY OFFICER—*continued.*
prosecution instituted by it at a rate fixed by the Local Government Board, "unless it has been agreed that the duty of affording such attendance shall be included in his salary." But where a resolution was passed by the sanitary authority fixing the salaries of medical officers of health at certain sums, to include the duty of attending at sanitary prosecutions, and a person was afterwards appointed medical officer of health by the committee of management of a dispensary district, and subsequently attended at a prosecution at the request of the sanitary authority, it was *held* that the medical officer was bound by the resolution of the sanitary authority, and not entitled to the remuneration fixed by the Local Government Board pursuant to the statute, although he had no notice of the resolution at the time of his appointment or afterwards. *O'Connell* v. *Guardians of Midleton Union* - - - - - - Q. B. 255

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10 & 11 Vict. c. 31—Poor Relief, ss. 27, 28 57
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12 & 13 Vict. c. 97—Dublin Improvement, s. 71
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14 & 15 Vict. c. 92—Summary Jurisdiction, ss. 20, 24 - - - - - - - - 694
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54 & 55 Vict. c. 57—Redemption of rent, ss. 1, 3
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——— s. 16 - - - - - - 761
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59 & 60 Vict. c. 47.
——— s. 19 - - - - - - 378
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——— s. 40 - - - - 391, 416
See LAND LAW IRELAND ACTS.
60 & 61 Vict. c. 20—Quarter Sessions Jurors 508
See SUB-SHERIFF.
60 & 61 Vict. c. 66—Judicature, s. 5 - 300
See NEW TRIAL MOTION.

STATUTORY POWERS— *Negligence — Local Drainage Board—Injury caused by negligence in the execution of statutory powers — Flowing water — Drainage (Ireland) Act*, 1863 (26 & 27 *Vict. c.* 88.] In or prior to the year 1883, acting in the execution of their statutory powers of construction and maintenance, the defendants, a Drainage Board constituted under the 26 & 27 Vict. c. 88, for the purpose of draining and improving the district, made deeper and wider the bed of the Rathangan river, and diverted into it another stream, thereby materially increasing the volume of water flowing down the Rathangan river, and altering its natural flow. They failed to exercise due care in periodically cleansing the river bed, the necessity for which was mainly or wholly caused by the increased flow of water and the alterations made by the defendants. As the direct result of such negligence on the defendants' part, the river became so choked with accumulations of silt and mud that, in July, 1896, after some heavy rains, the waters of the Rathangan river and its tributary streams, being hemmed back by the obstructions so permitted to accumulate and unable to escape, flooded the lands of the several plaintiffs, tenants from year to year of small holdings near the river. On case stated on the hearing at Assizes of appeals in civil bills claiming damages for the damage so caused:—*Held*, that the defendants were liable; that the matters complained of gave to the plaintiffs a right of action at common law, and that the statute (under which the defendants claimed immunity) afforded a justification only for acts done under the statute with due care, not for acts done negligently. *Geddis* v. *Proprietors of the Bann Reservoir* (3 App. Cas. 340) followed. *Bligh* v. *Rathangan River Drainage District Board*; *Others* v. *Same* - Q. B. 205

STATUTORY TERM—Commencement of — Fair rent agreement - - 308, 321
See FAIR RENT. 1, 2.

SUB-SHERIFF — *Expenses under Quarter Sessions Jurors' (Ireland) Act*, 1897 — *Presentment.*] A presentment for defraying expenses of a sub-sheriff under the Quarter Sessions Jurors' (Ireland) Act, 1897, must be confined to expenses actually incurred at the time. *In re Tipperary Presentment; Sub-sheriff's expenses* - Q. B. 508

SUMMARY JURISDICTION.
See JUSTICES.

SURCHARGE—*Local Government Board auditor —Payments which the auditor deems to be "contrary to law or unfounded"* — Certiorari—*Local Government (Ireland) Act*, 1871 (34 & 35 *Vict. c.* 109), *s.* 12.] The Commissioners of Killarney Township thought fit to have, at one and the same time, two systems of lighting in their township, the one by gas, the other by electricity, under two different contracts, with two different persons, the gas contract being the earlier in date. It may be here assumed that the gas contract was invalid, as being for over £50, and not duly sealed as required by the Public Health Act. Both contracts had, however, been recognized as valid by the decrees of the County Court for work done and services rendered thereunder. It may also be assumed that one lighting contract would have been amply sufficient for the needs of the township, and that the existence of two concurrent contracts was owing to a want of unanimity among the Commissioners. Certain of the Commissioners (the present applicants) had signed (*a*) a cheque for £41 17*s.* 6*d.*, the amount of an unappealed civil bill decree obtained, for work under their contract, by the Electric Light Company, and costs, and (*b*) two cheques for £17 10*s.* 6*d.*, and £25 14*s.* 3*d.*, to the same Company, the one prior, the other subsequent to said decree. The auditor, when auditing the township accounts, surcharged these payments against the present applicants on the ground that they were unfounded and illegal, inasmuch as the Commissioners had no right to enter into a second contract for the very same thing, for the doing of which they had already entered into a valid contract. On *certiorari*, *held*, taht the surcharges must be quashed—(*a*) the first surcharge, on the ground that it was in respect of payment of a debt which a competent Court had conclusively established to be due—and (*b*) the other surcharges, either on the ground (*per* O'Brien and Johnson, JJ.) that they were in respect of payments under a contract the validity of which was recognised by such decree, or on the ground (*per* Palles, C. B.) that, as there was no evidence to sustain the expressed reason of the auditor's surcharge (viz. the existence of a prior valid contract), the surcharge could not be supported. *Reg.* (*Duckett*) v. *Calvert* Q. B. 511

2. —— *Local Government Board auditor—"Person making or authorising the making of" an "illegal payment"—Local Government (Ireland) Act*, 1871 (34 & 35 *Vict. c.* 109), *s.* 12—*Labourers (Ireland) Acts*, 1883 *to* 1886.] The Guardians of the Poor of the Skibbereen Union, as Sanitary Authority of their district, entered into a contract for the repair of certain labourers' cottages, their property, these repairs to be completed within a certain time to the satisfaction of their engineer. Owing to the contractor's default, the work was not completed within

SURCHARGE—*continued.*
the time limited; and, several months after the period for completion had expired, the engineer gave to the contractor a certificate declaring him entitled to a certain sum on account of work done under the contract, and this amount was paid by the Guardians. The respondent, an auditor under the Irish Local Government Board, when auditing the Guardians' accounts, surcharged this amount, which he deemed to be an illegal payment, against the Guardians' engineer, as being "the person authorising the making of the illegal payment":—*Held* (by Sir P. O'Brien, L.C.J., and Gibson, J.; *diss.* Murphy, J.) that, assuming the payment to have been an illegal one, the engineer could not be treated as "the person authorising the making of the illegal payment" within section 12 of the Local Government (Ireland) Act, 1871, and that the surcharge should be quashed. *Reg.* (*O'Leary*) v. *Calvert* - - - - - - - - Q. B. 266

SURETY—*Co-sureties — Contribution—Non-execution of instrument by one of several co-sureties—Discharge — Baronial guarantee, counter security for — Relief of Distress* (*Ireland*) *Acts*, 1880, 1881 (43 *Vict. c.* 4; 43 & 44 *Vict. c.* 14; 43 & 44 Vict. c. 44).] Under the Relief of Distress (Ireland) Acts, 1880 and 1881, the Commissioners of Public Works agreed to advance £95,000 to certain Harbour Commissioners in county Kerry on repayment with interest being guaranteed by five baronies of the county. As a counter security, under said Acts, seven persons signed an agreement, dated 20th September, 1881, that, if the baronial guarantee was given, they would enter into a deed of covenant jointly and severally with the Secretary of the Grand Jury, acting under these Acts, in such manner as the extraordinary Presentment Sessions (to be convened under said Acts by the Lord Lieutenant) should require, to pay, in relief of four of these five baronies, one-nineteenth of every sum which the five baronies might be called upon to pay, so as to indemnify the four baronies to that extent. This document was submitted to, and approved of, by the Sessions, the guarantee given, and the advance made. It was then handed by the solicitor for the Harbour Commissioners to the solicitor for the Secretary of the Grand Jury (the plaintiff), in order that the latter might have the deed of covenant perfected. The plaintiff's solicitor, when the draft was ready, gave notice to the signatories that it was ready for their approval; receiving no reply, he engrossed the draft and sent it, on the 9th March, 1883, to the solicitor for the Harbour Commissioners, requesting him to get it executed. The deed of covenant was subsequently executed, as of the 9th March, 1883, by all the signatories to the agreement of 1881, except *H.* *H.* had left Ireland in April, 1882, and had been resident abroad until July, 1894. During

SURETY—*continued.*
this time he had not been required, nor had any steps been taken to compel him, to execute the deed. Meanwhile, as instalments of the baronial guarantee were from time to time called for, the plaintiff applied to the six persons by whom the deed had been executed (the defendants) for payment of one-sixth each of the one-nineteenth of such instalments, and was paid these amounts by them. They knew that *H.* was out of the country; that he had been and was in embarrassed circumstances, but were unaware that he had not executed the deed. In March, 1894, the plaintiff informed one of the defendants that one of the sureties had not executed the deed. Thereupon the six defendants repudiated liability. In July, 1894, *H.* returned to Ireland; and, in August of that year, the plaintiff's solicitor wrote asking him to execute the deed. *H.* refused. The plaintiff now brought this action, on the deed of covenant of 1883, against the six defendants who had signed same, to recover the one-nineteenth of certain moneys the baronies had been obliged to pay on foot of their guarantee. Verdict, by direction, and judgment having been entered at the trial for the plaintiff, the defendants now moved to have same set aside and judgment entered for them:—*Held*, that the defendants had signed the deed of 1883 on the faith that it should be executed by all the seven parties to the agreement of 1881; that it lay on the plaintiff to obtain the execution of same by the parties thereto; that *H.'s* known insolvency at the time did not render execution of the deed by him immaterial; that there was no evidence of waiver of their rights by the defendants, or of acquiescence in the non-execution of the deed by *H.*; and that the action was therefore unsustainable. *Evans* v. *Bremridge* (2 K. & J. 174; 8 D. M. & G. 101) followed. *Fitzgerald* v. *M'Cowan* [Q. B. 1

TENANCY—Notice to sell—Disagreement as to price - - - 378, 586, 592
See VALUE OF TENANCY. 1, 2.

TENANTS IN COMMON—Holding—Partition—Fair rent - - - - - 364
See HOLDING.

TEST—Of buoy—Insufficiency—Negligence 271
See HARBOUR COMMISSIONERS.

THROUGH CARRIAGE—*Railway Company—Carriage of goods—Through booking contract—Carriage over lines belonging to different Companies—Carriage partly by sea—Agreement between different Companies—Freight collected by Company delivering the goods—Liability of Company delivering the goods for injury thereto in the absence of proof that the damage was done on their line—Agency—Authority—Evidence.*] Goods were received from a merchant in Manchester by the Lancashire and Yorkshire Railway Company, under a through booking contract, to be carried for the plaintiff, and to be deli-

THROUGH CARRIAGE—*continued.*
vered to him in Limerick. The goods were carried from Manchester to Limerick and there delivered to the plaintiff under an arrangement made between the various carrying Companies concerned, by which the freight was divisible amongst them in proportion to the mileage traversed by each, but was to be collected by the defendants from the consignee. The goods were injured in transit, but there was nothing to show on what part of the journey the injury occurred. On a special case stated by the Lord Chief Baron at the Assizes, on the hearing of an appeal from a dismiss on the merits of a civil bill, brought to recover damages from the defendants for breach of contract to carry from Manchester to Limerick:—*Held*, by the Court of Appeal (affirming the decision of the Queen's Bench Division), that there was no evidence that the through booking contract was made by the Lancashire and Yorkshire Railway Company, as agents of the defendants, and that therefore, in the absence of proof that the injury was done on the defendants' line, the defendants were not liable. *Tuohy* v. *Great Southern and Western Railway Co.*
[Q.B. 789; App. 801

TITHE RENTCHARGE—*Variation*—"*Average price of corn,*" *omission to publish in* Dublin Gazette—Certiorari—1 & 2 *Vict. c.* 109, *s.* 32.] The *Dublin Gazette* having ceased to publish the average prices of corn since September 1, 1887:—*Held*, by Sir P. O'Brien, L.C.J., and Palles, C.B. (*diss.* O'Brien and Johnson, JJ.), and, on appeal, by the Court of Appeal, that Justices at Quarter Sessions are without jurisdiction to vary tithe rentcharge. *Reg.* (*Metge*) v. *Chairman and Justices of Meath* - - - Q.B. 592; App. 624

TOLLS—*Market—Markets and Fairs Clauses Act*, 1847 (10 & 11 *Vict. c.* 14)—*Special Act*—53 & 54 *Vict. c. ccxlvi—Smithfield Market—Tolls on hay and straw—Summary jurisdiction—Incorporation of statute—Construction of statute.*] Section 39 of the Markets and Fairs Clauses Act, 1847, provides a summary procedure for the recovery of tolls. Section 1 of the same Act declares that its provisions are not to apply except where it is incorporated by the Special Act authorising the undertaking. The Act was expressly incorporated by the Dublin Improvement Act, 1849 (12 & 13 Vict. c. 97, s. 71), which, however, contained a clause (sect. 82) declaring that Smithfield Market should at all times remain a free and open market. The Dublin Improvement (Amendment) Acts of 1861 (24 & 25 Vict. c. 26) and 1864 (27 & 28 Vict. c. cccv.) recite the Act of 1849, and each of these Acts contains a clause directing that it is to be read along with the Act of 1849 and the Acts incorporated therewith. The Dublin Corporation Act, 1890 (53 & 54 Vict. c. ccxlvi) recited the Acts of 1849, 1861, and 1864, that some of their provisions required amendment,

TOLLS—*continued.*
that it was expedient to authorise the Corporation to take tolls in Smithfield Market, and (by section 86) enacted that when that Market should be completed and opened for use the 82nd section of the Act of 1849 was to be repealed and the Corporation entitled to charge the tolls mentioned in the schedule to the Act on hay and straw exposed for sale. After the completion of the Market, the Corporation, relying on section 39 of the Markets and Fairs Clauses Act, 1847, sought to recover these tolls on a summons before the Chief Metropolitan Police Magistrate, who held that he had no summary jurisdiction as to the same. The Corporation having obtained a conditional order for a *mandamus* to compel the magistrate to hear and determine the summons:—*Held*, by the Court of Appeal (reversing the decision of the Queen's Bench Division), that the Markets and Fairs Clauses Act of 1847 was not incorporated with the Act of 1890, and that consequently the tolls could not be summarily recovered before the magistrate. The mere fact of two statutes being *in pari materia*, even with an express provision that both shall be construed together as one Act, is insufficient to justify the application to a new subject-matter in the second Act of the provisions of the earlier Act. *Ward* v. *Stevenson* (1 New Sessions Cases, 162) approved. *Reg.* (*Corporation of Dublin*) v. *Dublin Metropolitan Police Magistrates*
[Q.B. 762; App. 769

TOWNSHIP COMMISSIONERS—*Tramways* (*Ireland*) *Acts*, 1860, *s.* 38; 1861, *s.* 5—*Special meeting—Resolution approving of construction of light railway—Traverse—Jurisdiction.*] Where Township Commissioners having control of the public roads within their township, and acting under the provisions of sect. 38 of the Tramways (Ireland) Act, 1860, hold a special meeting, and pass a resolution approving of the construction of a line of light railway running partly through the said township and partly through an adjoining county, such resolution can, under the provisions of sect. 5 of the Tramways (Ireland) Amendment Act, 1861, be traversed, on the grounds of non-compliance by the promoters with the statutory requirements provided by the same Acts. Where such a township is situate partly in the county of Dublin and partly in an adjoining county, and the proposed undertaking runs partly through that portion of the township which is situate in the county Dublin, a traverse for such non-compliance, so far as the county Dublin portion is concerned, must be entered and tried in the Queen's Bench Division. It is not necessary that such Commissioners should meet and pass such resolution on a day *before* the meeting of the Grand Jury of the said county; and the fact that such meeting was held a few days subsequently is not in contraven-

TOWNSHIP COMMISSIONERS—*continued.*
tion of sect. 38 of the said Act of 1860. *Dublin, Wicklow, and Wexford Railway Co.* v. *Bray Township Commissioners* - - - Q.B. 83
—— Accounts—Surcharge - - - 511
See SURCHARGE. 1.

TRAMWAY—*Baronial guarantee—Treasury subvention—Certificate of arbitrators under Tramways (Ireland) Act*, 1883—*Excess of jurisdiction—Error in certificate—Grand Jury—Presentment—Fiat of Judge of Assize*—Certiorari—*Tramways (Ireland) Act*, 1883 (46 & 47 *Vict. c.* 43), *s.* 6.] The Grand Jury of county Mayo made a presentment guaranteeing a certain dividend on the share capital (£98,000) of a certain Light Railway Company—the undertaking to be worked by the *W. & L.* Railway Company, who were to retain 50 per cent. of the gross profits, and pay the other 50 per cent.—or, as a minimum, £51 a week—to the new Company. The guarantee was not to commence to accrue until the undertaking was fully completed, taken over, and opened for traffic. The presentment was ratified by Order in Council (confirmed by statute, 54 Vict. c. i), by which a subvention from the Board of Works was guaranteed in ease of the county. The line was opened for traffic on the 1st May, 1894, but upon the ground that the undertaking was not fully completed, the arbitrators (appointed by the Board of Trade under section 6 of the Tramways (Ireland) Act, 1883) made no certificate for the half-years ending 31st October, 1894, and 30th April, 1895. On the 20th December, 1895 (the undertaking having been meanwhile fully completed and taken over), the arbitrators made up their first certificate, for the half-year ending 31st October, 1895, and therein erroneously included, under expenditure, outlay (£819 13*s.* 9*d.*) applicable to the two preceding half-years (though they only took into account the gross receipts of the particular half-year), and, as the result, certified to a partial insufficiency of net receipts to meet dividend of £1773 19*s.* 2*d.* The Grand Jury presented and levied this sum in 1896 (the presentment being fiated without opposition), and applied to the Board of Works for their subvention of a moiety of this amount. Investigation disclosing the error, the Board refused to contribute more than a moiety of the correct amount (£1773 19*s.* 2*d.*, less £819 13*s.* 9*d.*). This the Grand Jury declined to accept, and a Petition of Right was instituted which resulted at the trial in judgment for the suppliants that the Board should pay a moiety of the sum certified for and presented. Meanwhile the Crown obtained a writ of *certiorari* removing the certificate and presentment into the Court for its consideration. On new trial motion of the petition, and argument on the return to the writ:—*Held* (Palles, C.B., dissenting), that—the Court being bound to entertain evidence upon the question whether the arbi-

TRAMWAY—*continued.*
trators had exceeded their jurisdiction, and it appearing that the arbitrators had transgressed the limit of their authority in dealing with expenses antecedent to the half-year in regard to which their certificate was given, and before the guarantee commenced to accrue—that certificate, and with it the presentment founded thereon, should be quashed on *certiorari*; and that (on the Petition of Right) the judgment for the suppliants should be altered into a judgment for the lesser amount. *In re county Mayo Presentment*; *Kelly* v. *Reg.* [Q.B. 719 [Rev.
—— Resolution approving of construction—Traverse - - - - - - 83
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TRANSFER — License—Alteration in premises
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TRAVERSE—Tramways Acts 1860, s. 38; 1861 s. 5 - - - - - - - 83
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TREASURY SUBVENTION — Guaranteed dividend - - - - - 719
See TRAMWAY.

TRESPASS — Several offences complained of in one summons—Order—Costs - 694
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TRESPASSER—Injury to—Standard of care and skill required - - - - 556
See NEGLIGENCE.

TRIAL—Without a jury—Probate or matrimonial cause—New trial motion - - 300
See NEW TRIAL MOTION.

ULSTER CUSTOM—Increased letting value—Allowance in respect of improvements
See FAIR RENT. 4. [709

UNDIVIDED SHARE—Holding—Partition
See HOLDING. [344

VALUABLE CONSIDERATION — Bankruptcy Act, 1872, s. 52 - - 302
See BANKRUPTCY.

VALUATION LIST — Premises occupied for public or charitable purposes - 656
See RATES.

VALUE OF TENANCY—*Jurisdiction—Notice by tenant of intention to sell—Landlord's notice of intention to exercise the right of pre-emption—True value*—Bona fide *disagreement as to price—Mortgagee in possession—Real tenant—Jurisdiction—Land Law (Ireland) Act*, 1896, *sect.* 19.] (1) The Sub-Commission have no jurisdiction to make an order as between landlord and tenant fixing the true value of the holding under the Land Law (Ireland) Act, 1881, sect. 1, unless there has been an actual and *bona fide* disagreement as to the price between the landlord and tenant. (2) *Sed quære:* Whether such disagreement must necessarily take place after service of the notice of the tenant's intention to sell? (3) Where the landlord has notice of a

VALUE OF TENANCY—*continued.*
valid mortgage subsisting on the tenant's interest, which has not been duly objected to as a sale by him, he cannot thereafter treat the tenant, to the prejudice of the mortgagee, as a person qualified to sell the tenancy. (4) The mortgagee who holds by such valid assignment, subject to redemption, the interest of the tenant in the tenancy is the tenant of the holding, as between all parties, once the landlord has notice thereof and does not dissent. *Mullan, Tenant; Traill, Landlord* - LAND COM. 378

2. —— *Notice by tenant of intention to sell tenancy —Offer by landlord of sum for purchase "without prejudice"—Non-acceptance by tenant—Disagreement—Application to Court to fix true value—Land Law (Ireland) Act*, 1881 (44 & 45 *Vict.* c. 49), *s.* 1 (3)—*Rules (January* 2, 1897), 98, 99.] A tenant having served notice of his intention to sell his tenancy, the landlord on the sixth day following, wrote offering a sum for same, adding, "which I hope you will consider fair, and treat without prejudice." No reply was made to that offer, and six days later the landlord served an originating notice to ascertain the true value of the tenancy:—*Held*, by the Land Commission that the non-acceptance by the tenant of the landlord's offer constituted a disagreement within the meaning of section 1, sub-section 3 of the Land Law (Ireland) Act, 1881 (44 & 45 Vict. c. 49), and that the landlord was entitled to have the true value of the tenancy ascertained under that sub-section. The decision of the Land Commission affirmed by the Court of Appeal. *Clark, Tenant; Taylor, Landlord* [LAND COM. 586; APP. 592

VARIATION—Tithe rentcharge—Non-publication of average prices in *Dublin Gazette* *See* TITHE RENTCHARGE. [592, 624

VENDOR AND PURCHASER — Conditions of sale — Outgoings — Grand Jury cess *See* CONDITIONS OF SALE. [296

WATER RIGHTS—Tenants of common landlord—Presumption of lost grant - 532 *See* EASEMENT.

WIDOW—Intestate's Act, 1890—Administration *See* ADMINISTRATION. 1. [79

WITHOUT PREJUDICE — Offer to purchase tenancy—Land Law Act, 1881, s. 1 (3) *See* VALUE OF TENANCY. 2. [586, 592

WORDS—"Next Sitting of the Petty Sessions Court"—5 & 6 Vict. c. 106, s. 103 135 *See* FISHERY ACTS. 2.

—— "Offence," 5 & 6 Vict. c. 106, s. 106 135 *See* FISHERY ACTS. 2.

—— "Payment contrary to law or unfounded"—34 & 35 Vict. c. 109, s. 12 - 511 *See* SURCHARGE. 1.

—— "Person authorising the making of an illegal payment"—34 & 35 Vict. c. 109, s. 12 *See* SURCHARGE. 2. [266

THE END.

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